August 2015

Shifting the Burden of Proving Self-Defense - With Analysis of Related Ohio Law

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SHIFTING THE BURDEN OF PROVING SELF-DEFENSE — WITH ANALYSIS OF RELATED OHIO LAW

SENATE BILL NUMBER 42 was introduced into the Ohio General Assembly on February 1, 1977. The bill provides that while the burden of proof for all elements of the criminal offense with which an individual is charged rests upon the prosecution, the burden of proof for affirmative defenses rests upon the defendant, and he must prove his affirmative defense by a preponderance of the evidence.[1] Because the bill raises serious questions concerning placing the burden of persuasion with respect to affirmative defenses generally, and self-defense in particular, on the defendant, a study of the law and policy involved in shifting the burden to the defendant on these defenses is warranted.[2]

The Ohio Supreme Court, in the case of *State v. Robinson*,[3] recently held that self-defense was an affirmative defense requiring the burden of going forward to be imposed on the defendant.[4] In *Robinson*, the defendant was charged with aggravated murder in connection with the shooting death of his nephew. He introduced evidence tending to show that the deceased had previously made threats upon his life and that, on the day in question, the deceased had come to his home intoxicated and created an altercation between himself and the defendant. Further evidence suggested that the defendant had gone upstairs in his home to get a gun and had returned with it, shooting the deceased in the head.[5] The defendant pled self-defense and the lower court instructed the jury that the defendant bore the burden of proving his defense by a preponderance of the evidence.[6] The Supreme Court of Ohio held on appeal that the instruction was in error based upon a reading of Ohio Revised Code section 2901.05(A) which provides:

Every person accused of an offense is presumed innocent until proven

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[1] S.B. No. 42, 112th G.A. (1977-78). The bill was referred to the Senate Judiciary Committee on February 2, 1977.

[2] Subpart C of the bill, *id.*, states:

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

[3] 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).

[4] The determination that self-defense was an affirmative defense was based on a reading of OHIO REV. CODE ANN. § 2901.05 (C) (Page 1975), which includes exactly the same wording as subpart C of S.B. No. 42 (*see* note 2 *supra* for text of bill).

[5] 47 Ohio St. 2d at 105, 351 N.E.2d at 90.

[6] *Id.* at 106, 351 N.E.2d at 91.

> guilty beyond a reasonable doubt and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.[7]

The court ultimately concluded that the instruction was in error because the defendant did not bear the burden of proving self-defense by a preponderance of the evidence under the statute as construed by the court.[8]

The significance of the decision becomes apparent when the ambiguous concept of "burden of proof" is analyzed in detail. The term embraces two separate burdens of proof. The first is the burden of producing evidence, satisfactory to the judge, to bring a particular fact into issue. This is the burden of "going forward."[9] Normally the burden of going forward is critical to the defendant who wishes to avoid a directed verdict, since the mere production of significant evidence will create some doubt as to the certainty of the opponent's case. However, because of the presumption of innocence existing in criminal trials and the heavy burden of persuasion on the prosecution, a directed verdict for the prosecution is unlikely to occur.[10] Nonetheless, the burden of going forward is still critical for the defendant if he wants an issue on which he bears the burden to be considered by the jury. He may either present some evidence bearing upon the issue which will be weighed by the jury along with the evidence produced by the prosecution in rebuttal, or he may rely upon the evidence contained in the adversary's case itself if it raises the issue.[11] In either case, once the burden of going forward is satisfied, the issue will be considered by the jury without any instruction as to the satisfaction of the burden.[12] If the

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[7] OHIO REV. CODE ANN. § 2901.05 (A) (Page 1975).

[8] 47 Ohio St. 2d at 113, 351 N.E.2d at 94-95.

[9] W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 45 (1972); C. MCCORMICK, EVIDENCE § 336, at 783-84 (2d ed. 1972) [hereinafted cited as MCCORMICK] *See generally* Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45 (1890).

[10] There are also serious constitutional questions involved with directed verdicts in criminal cases. If the defendant has a sixth amendment right to trial by jury, he is arguably deprived of that right if a verdict in favor of the prosecution is rendered by the judge. If his only option is to produce some evidence by going forward, then his fifth amendment right against self-incrimination may be violated, especially where the defense is a "confession and avoidance" type, such as self-defense or entrapment. *See* 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1965) [hereinafter cited as WIGMORE].

[11] *See, e.g.*, People v. Steele, 26 N.Y.2d 526, 528-29, 260 N.E.2d 527, 528, 311 N.Y.S.2d 889, 891 (1970). For a discussion of the quantum of evidence required to satisfy the burden of going forward, see F. JAMES, & G. HAZARD, CIVIL PROCEDURE § 7.11, at 272 (1965); 9 WIGMORE, *supra* note 10, at § 2494.

[12] Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 904 (1968). Once the burden is satisfied, the jury must be instructed concerning the particular elements of the defense. State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). However, whether the defendant has met the burden of going forward is exclusively the court's concern.

judge determines that the defendant has been successful in tendering his defense, the resulting consequence of the action, whether it be exoneration from guilt or only mitigation of the applicable penal sanctions, will depend upon the jurisdiction's law as applied by the jury to the facts.

Conceptually, the burden of persuasion is no more complex, although its application has generated serious difficulties in the area of criminal jurisprudence during the last ten years. The burden of persuasion requires the party on whom it is placed to convince the trier of fact that the facts he is alleging are true. The burden operates only if the parties have already sustained their burdens of producing evidence and only after all the evidence in the case has been introduced.[13] If one party bears only the burden of production on an issue, once he has satisfied that burden the opposing party must persuade the jury by the appropriate degree of proof either that the facts alleged do not exist or that, if they do exist, they do not support the legal conclusion the party would have the jury draw. When the same party bears both the burden of going forward and the burden of persuasion, the distinction between the burdens loses vitality because, in any event, the party must meet the latter burden. It has even been argued that, in practicality, the party bearing only the burden of going forward must meet the burden of persuasion if his argument is to have an effect on the jury,[14] but this argument, like many others, stems from the frailty of human nature in operating a just legal system rather than the construction of the judicial system itself.

In placing just the burden of going forward on the defendant with respect to his plea of self-defense, the *Robinson* court left an easier burden on the defendant than the trial court had. Yet, the issue of how heavy the defendant's burden should be to prove self-defense has not been finally resolved in the State of Ohio, as the pendency of Senate Bill Number 42 clearly indicates. Although the Ohio Supreme Court has, subsequent to *Robinson,* based its decisions in allocating the burden of proof upon statu-

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[13] MCCORMICK, *supra* note 9, § 336, at 783-84. *See* State v. Toth, 52 Ohio St. 2d 206, 371 N.E.2d 831 (1977), a confusing opinion in which the court stated that although neither defendant nor the prosecution bore the burden of producing evidence of mitigating circumstances in a mitigation hearing, "the defendant only bears the risk of nonpersuasion." *Id.* at 216, 371 N.E.2d at 837.

[14] MCCORMICK, *supra* note 9, § 337, at 784, provides: "Juries disregard their instructions on this question and judges, trying cases without juries, pay only lip service to it, trusting that the appellate courts will not disturb their findings of fact. . . . A risk of nonpersuasion naturally exists anytime one person attempts to persuade another to act or not to act."

McCormick concedes, however, that the problem in jury trials may not be the confusing nature of the burdens themselves, but the confusing nature of the jury instructions required. This problem is discussed *infra,* at text accompanying notes 152-83.

tory grounds,[15] decisions by the United States Supreme Court suggest that consideration of statutory wording is not the only consideration which is relevant in light of the fourteenth amendment Due Process Clause. The considerations appear to be much wider, concentrating upon the justice and fairness of the criminal judicial system rather than any arbitrary test based on the way the state legislature has defined the crime.

It is the purpose of this work, then, to examine the standard currently adopted by the United States Supreme Court in allocating the burden of proof between the state and the defendant in criminal prosecutions, to uncover the various considerations that do or should affect the operation of that standard, and then to apply that standard to the concept of self-defense in Ohio. It is submitted that only through such an analysis can a decision be reached as to whether a defendant in Ohio can properly be made to bear the burden of persuasion on the issue of self-defense.

I. BURDEN ALLOCATION BY THE UNITED STATES SUPREME COURT

A. *In re Winship*

The requirement that the prosecution bear the burden of proving defendant's guilt beyond a reasonable doubt has long been recognized as a basic tenet of American jurisprudence.[16] However, the first recognition that the requirement was constitutionally mandated appeared in a relatively recent case, *In re Winship*.[17] *Winship* concerned a twelve year-old boy suspected of entering a locker and stealing $112 from a woman's pocket book. A judge in the New York Family Court had ruled that section 744(b) of the New York Family Court Act did not require that the juvenile's guilt be established beyond a reasonable doubt and that the determination of guilt could be made on a preponderance of the evidence.[18] After studying the justification for section 744(b), the Supreme Court held that the due process standard of proof beyond a reasonable doubt must be applied to juvenile proceedings, based on the fact that in such proceedings, "the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years [and this] is comparable in seriousness to a

[15] State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (allocating burden of proving insanity). *See also* State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977) (allocating burden in mitigation hearing subsequent to guilt determination process).

[16] The constitutional basis of the rule has been assumed in the cases coming before the Court prior to 1970. *See* Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Leland v. Oregon, 343 U.S. 790, 795 (1952); Miles v. United States, 103 U.S. 304, 312 (1881); Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429, 438 (1976).

[17] 397 U.S. 358 (1970).

[18] N.Y. FAMILY COURT ACT § 744(b) (McKinney 1975) § 744(b) states that "[any] determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence." 397 U.S. at 360.

felony prosecution."[19] Finally, the Court focused on the advantages of placing the reasonable doubt burden on the prosecution and noted that there would be a reduction of convictions based upon factual error and a fostering of respect for the criminal justice system.[20]

Winship has been the subject of a great number of commentaries, not only because of the impact of applying the reasonable doubt standard to juvenile proceedings which differ from ordinary criminal proceedings because of their *parens patriae* character,[21] but also because of the Court's lack of clarity in explaining the parameters of the burden to be placed on the prosecution. While *Winship* has been cited as authority for the proposition that the "reasonable doubt standard is constitutionally required and extends to every element of the offense with which a defendant is charged,"[22] the language from which this rule is derived is not so clear. The explicit holding of the Court is "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every *fact* necessary to constitute the crime with which he is charged."[23] There is no precise similarity between the elements of a crime, or the facts of the crime as defined by statute, and the facts necessary to constitute that crime, which include the facts negating defenses to or in mitigation of criminal liability. Concededly, the prosecution might bear a much heavier burden if forced to prove all the facts necessary to constitute the crime. However, the *Winship* Court did not define what it meant by a "fact" of the crime involved.

Subsequent cases have indicated the pitfalls involved in construing "fact" as meaning *only* those facts defined by statute as "elements" of the crime as well as the pitfalls in construing the term with the broadest possible scope. If the language is construed narrowly, then the *Winship* rule will be reduced to a nullity by the possibility that a state legislature could arbitrarily define the elements of an offense and, consequently, remove the reasonable

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[19] 397 U.S. at 366. The court relied heavily on In re Gault, 387 U.S. 1 (1967), which it said "rendered untenable much of the reasoning relied upon . . . to sustain the constitutionality of § 744(b)." 397 U.S. at 365. The Court in *Gault* held that the requirements of due process, the right to counsel and the right against self-incrimination applied to a juvenile proceeding where a complaint alleged that a fifteen-year-old boy had made lewd phone calls.

[20] 397 U.S. at 363-64. The Court recognized that the court of appeals had erred in finding only a "tenuous difference" between the reasonable doubt and preponderance standards since the trial court judge had admitted that he might not be able to reach the same verdict of guilt given a harsher standard. *Id.* at 367.

[21] *See* In re Gault, 387 U.S. 1, 16 (1966); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 173-74.

[22] Case Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. CIVIL RIGHTS REV. 390 (1976) [hereinafter cited as *Unburdening the Criminal Defendant*].

[23] 397 U.S. at 364 (emphasis added).

doubt burden on those issues from the prosecution's shoulders at will.[24] If the language is construed more widely to place the burden on the prosecution of proving all the facts of the crime, then the state must also bear the burden of proving the nonexistence of all facts which could be recognized as exculpatory or mitigating circumstances affecting the degree of culpability or severity of the punishment.

However, many states have placed the burden of proving "mitigating" facts, or those facts affecting only culpability, upon the defendant, and the Supreme Court recently recognized that the legislature can shift the burden in circumstances where the fact in mitigation might be too difficult for the state to prove. In *Patterson v. New York*,[25] the Court announced: "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate."[26] The only logical conclusion is that a "fact" for *Winship* purposes is some undefined concept in the middle ground between those facts constituting "elements" of the crime and all other facts necessary to constitute the crime. If *Winship* is to be recognized as setting a valid standard for placement of the burden of proof, the prosecutor's burden of proving all "facts" of a crime must be more clearly defined in order to achieve meaningful and consistent application of the *Winship* holding.

The failure to elaborate on the test set out in *Winship* could be justified by the theory that an extensive definition of what constituted a "fact" of the crime was unnecessary at that time. The Court recognized in *Irvine v. California*[27] that "[t]he chief burden of administering criminal justice rests upon the state courts."[28] The *Irvine* Court discussed the reluctance to apply the exclusionary rule to the states under *Wolf v. Colorado*[29] because "thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it," illustrating the Supreme Court's desire to allow the states a certain degree of discretion in criminal

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[24] The courts have ordinarily recognized the ability of the legislature to define elements of the crime. *See* Powell v. Texas, 392 U.S. 514 (1968), where the Court refused to interfere with a legislative determination that the crime of public drunkenness could be committed even by a chronic alcoholic. The state was not required to except chronic alcoholics from the statute.

[25] 432 U.S. 197 (1977). *See infra* notes 54-88 and accompanying text.

[26] 432 U.S. at 209.

[27] 347 U.S. 128 (1934).

[28] *Id.* at 134. In *Irvine*, petitioner was convicted of horse race bookmaking on the basis of evidence obtained by illegal entries into his home. The Supreme Court held that the conviction did not violate the fourteenth amendment.

[29] 338 U.S. 25 (1949).

matters.[30] Particularly in the realm of juvenile affairs, where the state's function could be characterized more as *parens patriae* rather than as impartial arbiter, the *Winship* Court may have felt a certain reluctance to straitjacket the states by defining the burden to be placed on the juvenile courts.[31] The ambiguous test set out in *Winship* had a double impact, however, for it also permitted the judiciary to intervene into the substantive criminal law of the states through interpretation of the *Winship* test.

B. *Mullaney v. Wilbur*

The first Supreme Court case to consider the matter was *Mullaney v. Wilbur*,[32] and the Court described the *Winship* test in the following way:

> The rationale [of *Winship*] requires an analysis that looks to the "operation and effect of the law as applied and enforced by the State," . . . and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.[33]

Mullaney was a habeas corpus proceeding in which the Court was asked to consider the trial judge's instruction to the jury that Maine law recognized two kinds of homicide, murder and manslaughter, and that while the prosecution was required to prove the common elements of unlawfulness and intention beyond a reasonable doubt, only if these elements were so proven was the jury to consider the distinction between murder and manslaughter. The judge further instructed that if unlawfulness and intention were proven, malice aforethought, the distinguishing element between murder and manslaughter, was to be conclusively implied unless the defendant proved by a fair preponderance that he acted in the heat of passion on sudden provocation.[34] Respondent contended that malice aforethought was an "element" distinguishing murder from manslaughter, and that on its narrowest interpretation, *Winship* required the prosecution to prove the element beyond a reasonable doubt. The Maine Supreme Judicial Court rejected this contention and stated that in Maine murder and manslaughter were not separate crimes, but different degrees of the "single generic offense of felonious homicide," and that the presumption of malice made a difference

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[30] 347 U.S. at 134.

[31] The Court in *Gault* indicated that a parental relationship was not an invitation to "procedural arbitrariness," but it qualified this statement with this statement from *Kent v. United States*, 383 U.S. 541, 562 (1966): "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of criminal trial or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment." 387 U.S. at 30.

[32] 421 U.S. 684 (1975).

[33] *Id.* at 700. The *Mullaney* Court also added a new term to the two already suggested by *Winship*, "critical fact in dispute." *See* text accompanying note 44 *infra*.

[34] *Id.* at 686-87.

only to the degree of the offense.[35] Therefore, the Maine Supreme Judicial Court deemed it permissible to place the burden of persuasion as to heat of passion on the defendant.

The Supreme Court of the United States did not reject the Maine Supreme Judicial Court's interpretation of its statute, but it did reject the conclusion that the burden of persuasion to prove heat of passion could be shifted to the defendant. In the opinion by Justice Powell, speaking for a unanimous court, the Justice traced the defense of heat of passion from its inception to 1975 and found that the defense had not only been the single most important factor in determining the degree of culpability attaching to unlawful homicide since the formulation of the common law concept of homicide itself, but that the law had progressively worked toward requiring the prosecution to bear the ultimate burden on the issue.[36] The Court then stated that the Maine rule did not comport with due process requirements.

Justice Powell found that the interests deemed vital in *Winship*, namely the reduction of the threat of erroneous convictions resulting from factual errors and the encouraging of respect for the criminal justice system, were endangered by Maine's allocation of the burden of proof to the defendant.[37] Justice Powell believed the protection of an individual against an erroneous conviction for a crime of a higher degree than warranted was equal in importance to protection of an innocent individual against a wholly wrongful conviction. He stated with respect to the procedure approved by the Maine Supreme Judicial Court:

> Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves

[35] *Id.* at 689. However, murder and manslaughter had been defined in two separate provisions of the Maine Criminal Code. The murder statute provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." ME. REV. STAT. ANN. tit. 17, § 2651 (1954) (repealed 1975).
Maine's manslaughter statute provided in relevant part: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought... shall be punished by a fine of not more than $1000 or by imprisonment for not more than 20 years...." ME. REV. STAT. ANN. tit. 17, § 2551 (1961) (repealed 1975).

[36] 421 U.S. at 693-97. The importance of this commentary cannot be understated. The concurring opinion in the recent case of Farrell v. Czarnetzky, 566 F.2d 381 (2d Cir. 1977), illustrates that the courts may turn to the historical analysis as the sole guide in deciding whether to apply the *Mullaney* decision or the later *Patterson* opinion to the circumstances at bar.

[37] 421 U.S. at 700-01. *See* text accompanying note 20 *supra*. In the later case of Hankerson v. North Carolina, 432 U.S. 233 (1977), the Supreme Court held that *Mullaney* was to be applied retroactively because the Maine procedures "substantially" impaired the court's truth-finding function and raised "serious" questions about the accuracy of guilty verdicts in past trials.

> a significantly lesser sentence. This is an intolerable result in a society where . . . it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.[38]

Justice Powell's majority opinion concentrated upon the consequences of wrongful conviction, the resulting stigma and impairment of personal liberty, and found that these interests also existed when an individual was forced to prove he had acted in the heat of passion to reduce the punishment for his crime. Therefore, the policy presumption that the defendant should bear the burden of proving the mitigating factor of heat of passion on sudden provocation was found constitutionally objectionable and *Mullaney* expanded due process requirements to include facts that mitigate the punishment as well as the statutory "elements" of the crime.[39]

The *Mullaney* decision creates many problems. *Mullaney* does not provide a clear standard by which to determine whether there is one statutory crime with a range of punishments or whether several crimes exist with each crime carrying its own punishment. This distinction is important, for if *Mullaney* does reject the "elements" approach, it only does so by going *beyond* that approach.[40] If a fact is an element, the prosecution bears the burden of persuasion even under *Mullaney*. By failing to determine what made the Maine murder-manslaughter statute a statutory crime with a range of punishments, the United States Supreme Court left open the possibility that proof of lack of malice may not have been merely a "mitigating factor," but an element of the crime of murder subject to the narrow *Winship* test. Thus, it is possible that the state's determination as to whether there exists a single statutory crime will be the sole determinant in deciding whether to apply the *Mullaney* "mitigation" rule or the *Winship* "elements" rule. If the state determines that there is only one statutory crime, then the court must balance the interests involved to decide on whom the burden should be placed. If there are two crimes, each carrying its own punishment, then the pure "elements" approach of *Winship* offers neither the opportunity

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[38] 421 U.S. at 703-04 (emphasis in original). At the extremes, the defendant in *Mullaney* faced either a nominal fine or life imprisonment, depending on whether he satisfied the burden imposed upon him. 421 U.S. at 700.

[39] This constituted a rejection of the "elements" approach which focused solely upon the statutory elements as defined by the state legislature to determine burden allocation. *See* Comment, 51 ST. JOHN'S LAW REV. 158, 169 (1976).

[40] The *Mullaney* decision suggests that the reasonable doubt standard should apply *not only* to statutory elements of the offense, but to mitigating or exculpating facts. The Court's language reads: "Moreover, if *Winship* were *limited* to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law." 421 U.S. at 699 (emphasis added).

nor the necessity for the reviewing courts to balance the interests of the state against those of the individual.[41]

Secondly, while *Mullaney* seems to reject the narrow "elements" interpretation of the *Winship* holding, unless the statutory scheme is to determine on whom the burden of persuasion is to be placed, the courts are free to use other and more discretionary bases to allocate the burden.[42] This suggests that *Mullaney* fills the no-man's-land between the narrow and liberal interpretations of *Winship,* in this instance, with the test of whether the fact upon which the defendant had the burden bore significantly on punishment or culpability. It has been suggested by others that the *Mullaney* opinion goes even further and adopts the liberal approach of *Winship* requiring that the state bear the burden of establishing the defendant's complete culpability by disproving all exculpatory or mitigating defenses the accused raises.[43] This contention may be supported by the language used by the Court, for the Court states that the prosecution must bear the burden of proving . . . the *critical* fact in dispute."[44] Although this language requires a new test to determine what constitutes a "critical fact," it is arguable that any exculpatory or mitigating defense may be critical to the extent it affects any subsequent punishment by the state.

Under a narrow reading of *Mullaney,* the Supreme Court continues the "elements" approach, allowing the federal court faced with the issue to determine on a "functional" basis what are "elements" of the particular crime and what are not.[45] Since the opinion stresses that "substance" should predominate over "form,"[46] it can be argued that *Mullaney* merely requires the courts faced with the problem to question whether the fact in question *really* is an element. If this is true, the Court was not merely advocating a balancing type approach once a mitigating factor was found, but was advocating the balancing approach to determine if the mitigating factor really was an element such that the defendant's burden should be placed on the prosecution. Given this interpretation, it would not matter whether the state court determined that its statute represented one crime with a series of punishments (in which case the perceived defense was only in mitigation of the crime) or two separable crimes (in which case the defense was

[41] The Maine Supreme Judicial Court had already determined that the murder and manslaughter statutes did not refer to separate crimes and either as a matter of constitutional authority or as a matter of comity, or a mixture of the two, the *Mullaney* Court did not discuss the issue. 421 U.S. at 691. *See* Osenbaugh, *supra* note 16, at 444 n.94.

[42] *See Unburdening the Criminal Defendant, supra,* note 22, at 395.

[43] *Id.* at 398.

[44] 421 U.S. at 702 (emphasis added).

[45] Osenbaugh, *supra* note 16, at 446.

[46] 421 U.S. at 700.

essential to disproving an element of the crime). In either case, the Supreme Court determined that proof of the mitigating factor of heat of passion was proof of the nonexistence of an element of the crime.[47]

It has at least been speculated that *Mullaney* portends the invalidation of the defenses of insanity, entrapment, and withdrawal from conspiracy[48] as well as the elimination of all other defenses[49] from the criminal law. However, in the few cases decided since *Mullaney,* the courts have not expanded upon that theory. In at least two cases,[50] courts have relied upon *Mullaney* to hold unconstitutional statutory provisions requiring defendants to bear the burden of persuasion with regard to "extreme emotional distress" in mitigating murder to manslaughter. But in other cases,[51] the defendant has been made to bear the burden of persuasion on a particular defense because the defense did not negate an element of the crime.

At least one argument which may be used to restrict expansion of the *Mullaney* rule is the following logic:

> That a state may choose to permit a person to mitigate the harshness of a penalty upon proof of some fact would seem to be irrevelant to the constitutionality of the legislative scheme if the Constitution would permit the greater penalty to be imposed regardless of the existence of that fact.[52]

The "greater includes the lesser" to which this argument is similar, has been

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[47] This interpretation seems to conflict with the *Mullaney* Court's refusal to adopt a different construction of the statute from that adopted by the Maine Supreme Judicial Court, which resulted in the holding that malice was *not* an element of the crime of murder. *See* note 41 *supra.* However, the *Mullaney* Court is merely stating that although in form malice is not an element of the crime, in substance it is and the state court determination is inefficacious.

[48] *See* Evans v. State, 28 Md. App. 640, 645-56, 349 A.2d 300, 307 (Ct. Spec. App. 1975), *aff'd,* 278 Md. 197, 362 A.2d 629 (1976) in which the court stated:

> Mullaney v. Wilbur *will render unconstitutional*: 1) *A presumption . . . placing upon a defendant an ultimate burden of persuasion, by any standard of proof, on any issue . . . . This ruling applies . . . to such defenses as: a. Any theory of justification . . . b. Any theory of excuse . . . c. Any theory of mitigation . . . d. Intoxication. e. Entrapment. f. Duress or coercion. g. Necessity.*

Id. at 645-46, 349 A.2d at 307 (emphasis in original).

[49] *Mullaney* may also invalidate all "affirmative defenses." As will be shown later, "affirmative defense" is a label sometimes used by states in referring to any defense which mitigates culpability or exculpates the defendant, and on which he bears the burden of proof. *See* note 98 *infra.*

[50] Fuentes v. State, 349 A.2d 1 (Del. 1975); People v. Balogun, 82 Misc. 2d 907, 372 N.Y.S. 2d 384, 372 (1975). The statutory provisions in each case bore substantial similarity to the provisions ruled unconstitutional in *Mullaney.*

[51] Grace v. Hopper, 234 Ga. 669, 217 S.E.2d 267 (1975) (ruling on the issue of insanity); Rivera v. State, 351 A.2d 561 (Del. 1976) (ruling on the issue of insanity); Cowart v. State, 221 S.E.2d 649 (Ga. App. 1975) (concerning abandonment).

[52] Allen, *Mullaney v. Wilbur: The Supreme Court and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention,* 55 TEX L. REV. 269, 285 (1977).

rejected on a number of grounds.[53] The rule, in essence, states that if the legislature can constitutionally criminalize conduct by providing a penalty for that conduct, it is constitutional for the legislature to structure defenses to that crime as it chooses and provide penalties for less culpable conduct. There is no reason the rule should not apply if the lesser penalties are *themselves* constitutional, *i.e.*, if each of the considerations of the *Winship* test, community confidence in the judicial system, stigmatization, and liberty-deprivation interests, are affected favorably.[54] But to determine whether the lesser punishment was constitutional in *Mullaney,* the Court utilized a comparative approach, comparing the effect of punishment of the lesser offense with the punishment of the greater. Conceivably, a court could analyze the lesser punishment in isolation when determining if it is constitutional, viewing the state's power to offer a particular defense and lesser punishment to the crime without studying the original crime and its defenses in detail. The resulting analysis would almost invariably allow the state to cast the burden on the defendant, since the mere offering of the defense or mitigation could be viewed as increasing the reliability of the judicial process and decreasing the danger of deprivation of liberty. However, the state could then permissibly shift the burden of persuasion of a fact of the crime to the defendant on an arbitrary basis, the result *Mullaney* sought to prevent.[55]

C. *Patterson v. New York*

Two years later, almost to the date, the Supreme Court of the United States was faced with its third major burden-shifting case, *Patterson v. New York.*[56] Marital difficulties had led Roberta Patterson to leave her husband Gordon and seek a divorce from him, resuming a relationship with a former

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[53] *Id.* at 286-90. The rule was established in Ferry v. Ramsey, 277 U.S. 88 (1928).

[54] Allen, *supra* note 52, at 290. Allen notes that the *Mullaney* statute should not have been overruled on the basis of *Winship* because of "dramatic differences" between the interests affected by the *Winship* statute and that of *Mullaney*. However, he does not state why the *Mullaney* statutory scheme is different in its impact.

[55] Merely minimizing the number of convictions based on factual error or maximizing respect for the judicial process does not automatically render a law valid under *Mullaney*. *See* Allen, *supra* note 52, at 285 n.44: "There may be constitutional interests other than those articulated in *Winship* that inhibit the power of the states to sanction the commission of homicides as they please. This article maintains that other interests exist and that they hold the key to *Wilbur* . . . ."

In State v. Patterson, 432 U.S. 197 (1977), the Court stated:

> [I]t is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion [and the Due Process Clause cannot be applied unless the state rule] offends some principle of justice so deeply rooted in the traditions of conscience of our people as to be ranked as fundamental.

Id. at 201-02.

[56] 432 U.S. 197 (1977).

friend, John Northrup.[57] At a later time, Gordon armed himself with a rifle and went to the house of Roberta's father, where he saw his wife semi-nude with her fiance and killed Northrup by firing two shots into his head. Patterson later confessed to the killing and was charged with second degree murder.[58] At trial, Patterson claimed that he had acted under the influence of extreme emotional distress and urged that he should be convicted, at most, only of first degree manslaughter.[59] Section 125.25(1)(a) of the New York Penal Law provides that in a prosecution for intentional murder, it is an affirmative defense that the accused:

> acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.[60]

The jury was instructed that while the prosecution bore the burden of proving the elements of the crime, intention to kill and causation of death, beyond a reasonable doubt, the defendant had the burden of proving the affirmative defense by a preponderance of the evidence.[61] The jury found appellant guilty of murder and judgment was entered on the verdict.

While appeal to the New York Court of Appeals was pending, the Supreme Court decided *Mullaney*. Appellant Patterson urged in the court of appeals that New York's murder statute was "functionally equivalent" to the Maine statute struck down in *Mullaney* and that his conviction should be reversed.[62] The Court distinguished *Mullaney* on the ground that, unlike *Mullaney*, the fact bearing upon mitigation was not a fact essential to the offense charged. The Court found that although the burden of persuasion could not be placed upon the defendant to show sudden provocation in Maine, the burden could be placed upon the defendant to show severe emotional distress in New York because the affirmative defense had no direct relationship to any element of murder. The United States Supreme Court affirmed, holding that the Due Process Clause did not place New York in the position of choosing between abandoning the affirmative defense altogether or disprov-

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[57] People v. Patterson, 39 N.Y.2d 288, 291, 347 N.E.2d 898, 900, 383 N.Y.S.2d 573, 575 (1976).

[58] *Id.* This confession was entered into evidence after a pretrial hearing at which voluntariness was established.

[59] *Id.* at 292, 347 N.E.2d at 900, 383 N.Y.S.2d at 575.

[60] N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975).

[61] 432 U.S. at 200. The New York Penal Law places a different burden on "ordinary defenses." The prosecution has the burden of disproving an ordinary defense beyond a reasonable doubt, and the defendant has the burden of going forward with the evidence. N.Y. PENAL LAW § 25(1) (McKinney 1975).

[62] 432 U.S. at 201.

ing it beyond a reasonable doubt where it could constitutionally convict without affording the defense in the first place and, of equal importance, that *Mullaney* could be distinguished because Patterson's defense did not negate any element of the crime.[63] Justices Powell, Brennan, and Marshall joined in a fervent dissent that attacked the majority's opinion because "[t]his explanation of the Mullaney holding bears little resemblance to the basic rationale of that decision"[64] and noted that "[r]ather, the defect in Maine practice lay in its allocation of the burden of persuasion with respect to the crucial factor distinguishing murder from manslaughter."[65]

The decision was a shock to the New York legal community. Several commentators had predicted that New York's affirmative defense statute would be held unconstitutional under *Mullaney*.[66] Three lower court decisions had held the law invalid.[67] The similarities between the Maine statute and the New York statute are many:

> The sole factor that distinguishes murder from manslaughter in both states is the existence of a negative—the absence of heat of passion in Maine and the lack of extreme emotional disturbance in New York. Neither mitigating factor rebuts any of the substantive facts the prosecution is required to prove. Rather, both are "collateral" to what the state has defined as the principal facts in issue, and both are explanative of the circumstances under which the defendant's intent was formed. In both instances, the defendant is required to prove the existence of this "collateral" mitigating factor by a preponderance of the evidence.[68]

Of course, the critical question is whether the New York law offends the dual interests critical to the *Winship* decision: the reduction of the threat of erroneous convictions resulting from factual errors, and the fostering of

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[63] *Id.* at 209. The requirement that the state be constitutionally able to convict the defendant on the "greater" offense is explicit:

> But in each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the state nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the state may assure itself that the fact has been established with a reasonable certainty.

Id. at 210. The Court indicated for example, that proof of the identity of the accused could not constitutionally create a presumption of all the facts essential to guilt.

[64] *Id.* at 222-23.

[65] *Id.* at 217.

[66] *See, e.g.*, Comment, *Mullaney v. Wilbur*, 4 HOFSTRA L. REV. 493, 500-01 (1976); Note, 27 SYRACUSE L. REV. 459, 474 (1976).

[67] People v. Davis, 49 A.D.2d 437, 376 N.Y.S.2d 266 (1975); People v. Woods, 84 Misc. 2d 301, 375 N.Y.S.2d 750 (Sup. Ct. 1975); People v. Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (Sup. Ct. 1975).

[68] Comment, *People v. Patterson: The Constitutionality of New York's Affirmative Defense of Extreme Emotional Disturbance*, 51 ST. JOHN'S L. REV. 158, 173 (1976).

respect for the criminal justice system.[69] But because of the similarities between the statutes, there is no reason to believe the mitigating factor in *Patterson* made less difference to potential loss of liberty and reputation than the defense of sudden provocation in *Mullaney*.

One rationale for the unexpected result is that the Court in *Patterson* had recognized policy considerations rejected by the *Mullaney* Court. Justice White, in his majority opinion, noted with respect to "severe emotional distress":

> The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state.[70]

Yet *Mullaney* had rejected the contention that the burden of proving heat of passion should rest on the defendant because, like intent, the burden required for its satisfaction the proof of facts peculiarly within the knowledge of the defendant.[71] It recognized that the burden of proving the absence of self-defense beyond a reasonable doubt was also placed on the prosecution in Maine even though the burden was "identical to the burden involved in negating the heat of passion on sudden provocation."[72] Finally, the *Mullaney* Court admitted it could find no "unique hardship" that would justify placing the burden of persuasion on the defendant to prove a fact critical to criminal culpability.[73] At least according to *Mullaney,* requiring the prosecution to bear the burden of showing the nonexistence of extreme emotional disturbance did not constitute a unique hardship which would warrant shifting the burden to the defendant. But the *Mullaney* decision, unlike that in *Patterson,* did not examine the practical effect its determination might have on state legislative bodies.[74]

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[69] *See* note 20 and accompanying text *supra.*

[70] 432 U.S. at 207. In the lower court, Chief Judge Breitel apparently also feared that forcing the prosecution to bear the burden of persuasion on the issue would encourage legislators to repeal existing affirmative defenses rather than permit courts to strike them down and convert them to ordinary defenses, which would result in the shift of the burden. *See* note 61 *supra* and accompanying text.

[71] 421 U.S. at 702-03.

[72] *Id.*

[73] *Id.* However, the Court did note that in some instances the prosecution was aided by a presumption, citing Davis v. United States, 160 U.S. 469 (1895) (presumption of sanity) or by a permissible inference, citing United States v. Gainey, 380 U.S. 63 (1965) (inference of knowledge from presence at an illegal still).

[74] The *Patterson* Court noted:

> There is some language in *Mullaney* that has been understood as construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact

The greatest problem in *Patterson* is its interpretation of the *Mullaney* decision. The Court in *Patterson* interpreted *Mullaney* not only as prohibiting the placement of the burden on the defendant when proof of an issue controverted a *statutorily prescribed* element of the crime, but also as holding that the state bears the burden of proving an *implied* element of the offense. The *Patterson* Court held that *Mullaney* required "[that] a State must prove every *ingredient* of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that *ingredient* upon proof of *the other elements* of the offense."[75] Thus, the *Patterson* Court considered proof of heat of passion upon sudden provocation as bearing upon a defined ingredient of the crime of murder rather than upon the punishment for felonious homicide. This interpretation is further supported by the Court: "Even so, a killing became *murder* in Maine when it resulted from a deliberate, cruel act committed by one person against another, 'suddenly, and without any, or without considerable provocation.' "[76]

From the language of the opinion, it is apparent that the *Patterson* Court accepted the narrow reading of *Mullaney,* holding that the *Mullaney* Court in fact applied its balancing approach to determine that proof upon the mitigating factor of heat of passion was proof in contravention of an element of murder. The *Mullaney* Court had rejected, however, the analysis of the district court and the opinion of the First Circuit, construing the statute in Maine as distinguishing murder from manslaughter because malice aforethought was a fact essential to murder and was absent from manslaughter.[77] The only possible interpretation remaining is that the *Mullaney* Court, irrespective of the statutory construction in the lower courts, judicially implied the "element" of malice into the separate crime of murder.[78] The *Patterson* Court's interpretation of *Mullaney* would be consistent with the opinion in that case.

Three factors indicate why the *Patterson* Court, in considering the New York statute, did not concern itself with the balancing approach of *Mullaney* in deciding whether the defendant should bear the burden of persuasion with respect to severe emotional distress. Maine had at least included malice

affecting "the degree of criminal culpability." It is said that such a rule would deprive legislatures of any discretion whatsover in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system.

432 U.S. at 214 n.15. The text of the *Mullaney* opinion, however, gives no indication that the Court intended *Mullaney* to have such a far-reaching effect.

[75] 432 U.S. at 215 (emphasis added).

[76] *Id.*

[77] 421 U.S. at 691. *See* note 35 *supra.*

[78] As noted previously, the use of the balancing approach to determine whether mitigating factors are essential to disproving an "element" of the crime under the narrow interpretation of *Mullaney* renders any statutory construction of the law meaningless. *See* note 47 *supra.*

in the *definition* of the crime of felonious homicide in each of the separate parts of the statute, the murder section and the manslaughter section. Before guilt under the appropriate section could be determined, the presumption of malice shifted the burden to the defendant to prove heat of passion. Thus, Maine had hoped to shield itself from *Winship* by lumping both crimes into the felonious homicide "heading" and arguing that murder and manslaughter were only classes of punishment.[79] The New York statute allowed conviction for murder without presuming any fact's existence for the prosecution of the defendant. All that need be proven was intent, an act, and causation. No burden shifted to the defendant before he could be found guilty under either section and the question of extreme emotional distress would perhaps never be raised.[80] The importance of the presumption in *Mullaney* was sufficient to question whether it was an element, but the mitigating factor in *Patterson* was not.[81]

At least one reason the Court in *Patterson* did not consider whether extreme emotional distress was an "element" of the offense might have been the history of the defense. While *Mullaney* had indicated that a large factor preventing the prosecution from shifting the burden of persuasion on the issue of malice to the defendant was the historical trend requiring the prosecution to bear the burden on the issue,[82] the *Patterson* Court noted with respect to extreme emotional disturbance "that this defense is a considerably expanded version of the common law defense of heat of passion on sudden provocation and the burden of proving the *latter,* as well as other affirmative defenses . . . rested on the defendant."[83] Thus, the defense did not have the developed historical background characteristic of the heat of passion defense. Justice Oakes, writing the concurring opinion in a Second Circuit case, *Farrell v. Czarnetzky,*[84] where the defendant had shouldered the burden of proving by a preponderance that a firearm used in committing a robbery was inoperable, indicated that the distinction may play a large role in restricting the types of cases to which *Mullaney* can be applied.

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[79] 421 U.S. 692-93.

[80] 432 U.S. at 209.

[81] Clearly, however, it was not so much that malice had been *presumed* in Maine that made it important but that it was a fact "the State deems so important that it must be either proved or presumed . . . ." 432 U.S. at 215. In practical effect the New York statute has the same result as a presumption, for if the mitigating factor is not proven, the defendant is guilty of murder. N.Y. PENAL LAW § 125.25 (McKinney 1975). Arguably the *Mullaney* "substance" over "form" balancing approach should have applied in *Patterson. Patterson* at least suggests that whether state legislation provides that a fact is presumed or that the fact is an "affirmative defense" is an indicator of state interest under *Mullaney's* balancing approach.

[82] 421 U.S. at 692-696.

[83] 432 U.S. at 202 (emphasis added).

[84] 566 F.2d 381 (2d Cir. 1977).

Finally, the oral arguments before the Court in *Patterson*[85] indicated that the Court could have found extreme emotional distress to negate the element of intent if it had so chosen. The argument of Victor J. Rubino of New York for the appellant, Patterson, was that defense of extreme emotional distress was similar to provocation, and provocation rebutted the statutory element of intent. He stated that:

> We're dealing with burden of proof; malice is only relevant to the proof by the state of intent, nothing else. Provocation is the other side of malice. In New York, as in Maine, an intentional killing is murder unless provocation is proved by the preponderance of the evidence by the defendant. And it is this that goes to the due process violation.[86]

The Court apparently decided that the prosecution was correct in its view that extreme emotional distress negated no element of the crime at all. Its opinion was in agreement with John M. Finnerty, District attorney for Steuben County, New York, who said: "The absence . . . isn't an element of the crime; it merely changes the degree of the crime. Mitigation, counsel maintained, is not constitutionally required. A defendant possesses unique knowledge which the state allows him to use in mitigation."[87]

The question of how far the *Winship* burden of proving "every fact" rule should be extended is, as yet, unclear. The pure "elements" approach has been rejected as being too restrictive in analysis and too tolerant of legislative subterfuge. The *Mullaney* Court, it is submitted here, sought to end the subterfuge through a balancing approach which would consider the interests of the state and of the individual respectively. The Court in *Patterson,* however, permitted legislative arbitrariness to continue as long as a state defines a fact so that it merely "mitigates" the crime at hand, except with the apparent limitations that the power to convict without the mitigating factor must be constitutional and that, where a real balancing of state and individual interests indicates the mitigating factor relates to an element of the crime, the statute must bow to the *Mullaney* rationale.[88] *Patterson* thus represents a class of cases where the state's interest in placing the burden of persuasion on the defendant is so great and the defendant's interest

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[85] 20 CRIM. L. REP. (BNA) 4199-4200 (March 23, 1977).

[86] *Id.* at 4199.

[87] *Id.* at 4200.

[88] The *Patterson* majority felt that there were constitutional limits beyond which the legislature could not go, and apparently these are "only the most basic procedural safeguards . . ." required by the Due Process Clause. 432 U.S. at 210. Justice Powell, author of the *Mullaney* decision, wrote a dissenting opinion in *Patterson* which included speculation that a formalistically correct statute presuming guilt on the basis of a minor fact such as physical contact and then permitting the defendant to go forward with an affirmative defense would withstand the principles of the majority opinion. 342 U.S. at 224-25 n.8.

in being free of that burden is so small that there is nothing to balance under *Mullaney*.

II. FACTORS TO BE WEIGHED IN THE BURDEN ALLOCATION DETERMINATION

To the extent that the Court in *Mullaney* weighed competing considerations of state and individual interests to determine what facts should be "elements" of the crime and on whom the burden should be placed, the Court was only doing what the state legislators had been doing for years.[89] *Mullaney* had merely affirmed the practice of weighing the interests and analyzing the considerations in light of due process of law.[90] The considerations that legislatures and courts had used in the past to determine on whom the burden should be placed, plus new interests deemed fundamental by the judiciary, could be used to satisfy the "balancing" test and, therefore, it is important that an understanding of the interests affecting the burden of persuasion in criminal cases be achieved.

During the nineteenth century, common law courts adopted the pattern of uniformly imposing on the defendant in a criminal action the burden of proving all matters which the common law lawyers referred to as "defenses."[91] The trend away from this pattern can be explained by the segregation of concerns in the criminal courts from the concerns evolving in private litigation. That is, the courts began to recognize that convicting a criminal was different from settling a private dispute because in criminal matters the state had to be more concerned with justly condemning a man than with efficiently arriving at a fair settlement. The state had to justify the use of its coercive powers.[92] Accordingly, while courts in the United States have expressed their willingness to adhere to the common law crimes[93] and common law principles for placing the burden of proving

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[89] The *Mullaney* Court, cannot, however, be accused of adopting a legislative function. By using the phrase, " 'every fact necessary to constitute the crime,' however, the *Winship* Court indicated that the identity of those facts 'necessary to constitute the crime' presents a federal question." Allen, *supra* note 52, at 270.

[90] *See, e.g.*, 421 U.S. at 700 n.27.

[91] 432 U.S. at 202; Fletcher, *supra* note 12, at 886.

[92] Fletcher, *supra* note 12, at 888. Note, however, that Pennsylvania continues to place the burden of proving all common law defenses on the defendant. Commonwealth v. Wilkes, 414 Pa. 246, 199 A.2d 411 (1964) (self-defense); Commonwealth v. Updegrove, 413 Pa. 599, 198 A.2d 534 (1964) (insanity); Commonwealth v. Burns, 367 Pa. 260, 80 A.2d 746 (1951) (self-defense); Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 823 (1935) (insanity).

[93] *See* W. LAFAVE & A. SCOTT, *supra* note 9, § 9, at 60: "Thus, it was that most of the states in the beginning had common law crimes. The states soon began to enact criminal statutes; and in the nineteenth century a number of states attempted to enact comprehensive statutory criminal codes . . . ."

affirmative defenses,[94] the more recent trend has not been towards the rule-orientation approach of common law defenses, but towards a balancing of respective interests of the state and the individual.

In *Morrison v. California*,[95] under a state law prohibiting an alien ineligible for citizenship to own or possess land, the Court held that it violated the Due Process Clause for a state to place upon the defendant the burden of proving citizenship as a defense.[96] The Court noted that:

> Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant . . . . The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.[97]

However, the trend comes about only in the face of a reluctance to sort out the policy demands and to dispense with seemingly logical guidelines for the allocation of burdens.[98]

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[94] *See, e.g.*, Commonwealth v. York, 50 Mass. 93 (9 Met. 1945). Many courts still do adhere to common law principles in placing the burden of proving affirmative defenses. *See* Brown v. State, 48 Del. 427, 105 A.2d 646 (1954); State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911). The *York* opinion is attributed with having heavily affected judicial thinking of the time. Fletcher, *supra* note 12, at 903.

[95] 291 U.S. 82 (1934).

[96] *Id.* at 88. The state only had to show that defendant possessed the land and to allege defendant's alienage.

[97] *Id.* at 91.

[98] Fletcher, *supra* note 12, at 894-95. The reluctance is illustrated by the *Patterson* Court's interpretation of *Mullaney* as being yet another "elements" approach case rather than an analysis of the impact of punishment on burden-shifting. *See* notes 42-44 *supra* and accompanying text.

It should be noted at this point that once the state makes a determination that policy supports shifting the burden of persuasion to the accused, the particular defense involved may be labelled differently. Although the distinction between a defense which relates to an element of the crime and one which is used only in justification or as an excuse has often been clouded by calling both sorts of defenses "affirmative defenses" (W. LAFAVE & A. SCOTT, *supra* note 9, at 46-47) the distinction is not without significance. It has been pointed out that:

> A true affirmative defense is a justification or excuse independent of the elements of the offense. It is in the nature of a "confession and avoidance" type defense in that even if the state proves all elements of the offense beyond a reasonable doubt, the defendant may not be punished since commission of the offense was justified.

Comment, *Constitutionality of Affirmative Defenses in the Texas Penal Code*, 28 BAYLOR L. REV. 120, 121 (1976) [hereinafter cited as *Texas Penal Code Defenses*]. The practice of removing facts from the defense classification, on which the prosecution would bear the burden of persuasion, and reclassifying them as "affirmative defenses" is, by all means, not uncommon. *See* Agata, *Survey of New York Law: Criminal Law*, 27 SYRACUSE L. REV. 47, 56 n.49 (1976) (listing the affirmative defenses in New York).

Although the reclassification may not be binding for due process purposes, it may be

A. *Insanity*

The courts have been most unwilling to depart from the common law approach in placing the burden of persuasion with respect to the issue of insanity on the defendant. The case of *Leland v. Oregon*[99] involved a criminal prosecution for murder in which the defendant had killed a fifteen year-old girl by striking her over the head several times with a steel bar and stabbing her twice with a hunting knife.[100] While he confessed to the murder, he pleaded not guilty by reason of insanity.[101] The Supreme Court found that the trial court could properly place the burden on the defendant to prove insanity beyond a reasonable doubt since:

> Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states [require] . . . preponderance of the evidence or some measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here.[102]

In light of the *Mullaney* dicta that the burden of persuasion cannot be shifted to the defendant simply because the fact at issue is peculiarly within his knowledge,[103] Justice Rehnquist, in a concurring opinion, stated that the *Leland* rule was consistent with *Mullaney* because "the existence or non-existence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of a crime."[104] Rehnquist's opin-

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useful for orderly description and application, as well as to facilitate analysis of the problems inherent in shifting the burden of persuasion. *See* Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson,* 23 U.C.L.A. L. REV. 293, 308-12 (1975).

Apparently, based upon the Court's reasoning in State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1965), the state of Ohio uses the term without reference to the distinction above. Therefore, the term "affirmative defense" in OHIO REV. CODE ANN. § 2901.05 (A) (Page 1975) can be used in referring both to defenses relating to elements of the crime and to other defenses as well.

[99] 343 U.S. 790 (1952). While *Leland* represents the state rule on burden-shifting in insanity cases, Davis v. United States, 160 U.S. 469 (1895) represents the federal rule, which prohibits shifting the burden to the defendant to prove the defense of insanity by a preponderance.

[100] 343 U.S. at 792.

[101] *Id.* at 791. The Oregon statute read: "When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt . . . ." OR. REV. STAT. §§ 136.390-.400 (*repealed* 1971).

[102] *Id.* at 798. At the present time, twenty-two states and the District of Columbia require the defendant to rebut the presumption of sanity beyond a reasonable doubt. *See* Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant,* 56 B.U.L. REV. 499, 503 (1976). [hereinafter cited as *Constitutional Limitations*].

[103] *See* notes 70-74 and accompanying text *supra.*

[104] 421 U.S. at 706.

ion has been subject to heavy criticism by authors finding a strong relationship to the element of intent.[105]

Since the decision in *Mullaney,* however, the Supreme Court has failed to recognize Rehnquist's opinion as being in error. In *Rivera v. Delaware,*[106] the Supreme Court of Delaware determined that a statute classifying mental illness as a defense on which the defendant bore the burden of persuasion did not violate the Due Process Clause. The United States Supreme Court dismissed the appeal of *Rivera* "for want of a substantial federal question."[107] Under the so-called "Hicks" rule, set forth in *Hicks v. Miranda,*[108] such summary dismissal constitutes a decision on the merits. As Justice White noted in *Hicks*: "We were not obligated to grant *Miller v. California* plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge was not a substantial one.[109] Thus, the Supreme Court has ruled upon the merits that a state's placement of the burden of persuasion on the defendant to prove insanity by a preponderance does not violate the Due Process Clause under *Winship* or *Mullaney.*[110]

At least one pre-*Mullaney* case accepted the Rehnquist rationale that "insanity" did not relate to an element of the crime,[111] while another rejected sanity as being an element because it was interpreted as being a condition precedent of all intelligent action.[112] Many state court decisions continue to reject placing the burden of persuasion on the prosecution on policy grounds. In *State v. Murphey,*[113] the Missouri Supreme Court declined to depart from the rule that the defendant should bear the burden of proving insanity, affirming its earlier decision[114] which had held that insanity was too easily simulated to force the prosecution to bear the burden. Similarly, a Nevada court held that in a case of criminal assault, freeing the defendant of the burden of proving insanity defeated considerations of public

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[105] *See Constitutional Limitations, supra* note 102, at 510.

[106] 351 A.2d 561 (1976).

[107] 429 U.S. 877 (1976).

[108] 422 U.S. 332 (1975).

[109] *Id.* at 344.

[110] However, a problem with the *Hicks* rule is that the doctrine on which the Court is ruling becomes obscured. For instance, it is difficult to determine whether the Court dismissed *Rivera* because shifting the burden to the defendant to prove insanity did not violate *Mullaney* considerations or whether the Court determined that the interest was not sufficient to invoke federal jurisdiction.

[111] Chase v. State, 369 P.2d 997 (Alaska 1962).

[112] State v. Quigley, 26 R.I. 263, 58 A. 905 (1904).

[113] 338 Mo. 291, 90 S.W.2d 103 (1936).

[114] State v. Redemeier, 71 Mo. 173 (1879).

policy and injured the welfare of society.[115] In a post-*Mullaney* case, *State v. Humphries,*[116] however, the Ohio Supreme Court rejected the motion that the defendant could be made to bear the weight of proving insanity by preponderance. This decision was based purely on statutory construction.[117]

An obvious rationale for casting the burden on the defendant, however, is that regardless of whether a subjective test is applied, the defendant possesses unique power over his mental facilities. For instance, the new criminal code commentary in Arkansas justified placing the burden of persuasion with respect to insanity on the defendant because of "the unique control the defendant has over inquiries into his mental state."[118] While experts in the field of criminal law recognize that the most common explanation for casting the burden of persuasion on the defendant is that insanity represents an affirmative defense of capacity rather than an element of the crime, they affirm that "[a] supporting consideration is the fear that if the rule were otherwise it would be too easy for a defendant who was sane to create a reasonable doubt concerning his sanity."[119] And the fact is that although mental science has experienced great advances since the first shifts of the burden of persuasion from the defendant began, the fields of psychotherapy and psychology are still inexact.[120] The view expressed here is that the more inexact that science is, the greater the likelihood that a sane individual will be able to raise a reasonable doubt as to his insanity. The interests of society demand that he bear a greater burden than merely to come forward with evidence on the issue.

B. *Entrapment*

According to *Sorrells v. United States,*[121] one of the three leading cases in the area, entrapment exists "when the criminal design originates with

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[115] State v. Nelson, 36 Nev. 403, 136 P. 377 (1913).

[116] 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).

[117] *Id.* The court found that insanity was an affirmative defense under OHIO REV. CODE ANN. § 2901.05(A) (Page 1975) and that State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976) had interpreted section 2901.05(A) as placing upon the defendant only the burden of coming forward with evidence. The problem of including insanity in a general statutory definition of "affirmative defense" is that even if the general rule is that the burden of persuasion may constitutionally be shifted to the defendant to show insanity, this possibility would be negated by a ruling that shifting the burden of proving all affirmative defenses is unconstitutional under that statute.

[118] Osenbaugh, *supra* note 16, at 436-37. *See also* ARK. STAT. ANN. § 41-601 (Crim. Code 1976), Commentary.

[119] W. LAFAVE & A. SCOTT, *supra* note 9, § 40, at 313.

[120] Diamond. *The Psychiatric Prediction of Dangerousness,* 123 U. PA. L. REV. 439, 451 (1975); Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CAL. L. REV. 693, 712 (1974).

[121] 287 U.S. 435 (1932). The other two cases are Sherman v. United States, 356 U.S. 369 (1958), and a more recent pronouncement applying *Mullaney* to the entrapment defense, State v. Matheson, 365 A.2d 716 (Me. 1976).

the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[122] The proper formulation of the defense has generated conflicting views concerning many evidentiary and constitutional considerations.[123] Yet the most important aspect about the entrapment defense is not disputed: when the subjective view of entrapment is adopted, the courts have read an implied exception into the particular criminal statute involved.[124]

There are two theories of entrapment. The majority view was expounded in *Sorrells,* in which a government prohibition agent posing as an Army soldier asked the defendant to sell him some whiskey.[125] The defendant initially refused, but after several more offers he sold the agent a half-gallon of whiskey and was charged with violating the National Prohibition Act. The *Sorrells* Court, in finding that defendant had been unjustly convicted, indicated that "the predisposition and criminal design of the defendant are relevant" to the issue of entrapment,[126] and that the case should be remanded for consideration of the defendant's predisposition.[127]

In *Sherman v. United States,*[128] decided by the Supreme Court twenty-six years later, the defendant was undergoing drug treatment along with a police informer when the informer, claiming he was suffering from withdrawal and needed drugs, asked the defendant to supply him.[129] In finding entrapment as a matter of law because of the extreme methods used to induce the defendant to supply the drugs, the Court applied the subjective test of entrapment. Justice Frankfurter, in a strong concurring opinion joined by Justices Douglas, Harlan, and Brennan, espoused a different test, the objective test, of entrapment. He stated: "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced."[130]

Therefore, the objective test focuses on the reasonableness of the police activity leading to the ensuing arrest. Despite the merits of Frank-

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[122] 287 U.S. at 442.

[123] *Id.* at 441.

[124] W. LAFAVE & A. SCOTT, *supra* note 9, § 48, at 372.

[125] 287 U.S. at 439.

[126] *Id.* at 451.

[127] *Id.* at 452.

[128] 356 U.S. 369 (1958).

[129] *Id.* at 373.

[130] *Id.* at 380.

furter's rationale for the defense, the United States Supreme Court has reaffirmed in two cases that the subjective test of entrapment is the better view.[131]

Each test has its own purpose. The theory is that while the objective test provides guidance for law enforcement officials in regulating their conduct, the subjective test only determines permissible police behavior on the basis of the defendant's predisposition.[132] The focus of the objective formulation is that overzealous law enforcement officers should be controlled in their official conduct, thus leading to the conclusion that the defendant should not be punished on policy grounds.[133] The subjective approach is based on the policy that conviction should be barred when government agents have played a part in inducing the defendant unless he was predisposed to commit the criminal act. Therefore, the theory rests upon an implied exception to the definition of the crime, an exception going to the element of intent.[134] Although the state legislature may have never intended to place the exception in the statute, the courts may read it in.[135] The entrapment cases which allow the courts to read a defense into a statute that did not contain the defense in the statutory definition exhibits even greater judicial authority than the *Mullaney* decision which allows the courts to construe a part of the definition of the crime as being an element.

It is also clear that when the subjective view is adopted, the rule of *Mullaney* should apply.[136] In the recent case of *State v. Matheson*,[137] the

[131] Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973). *Russell* can also be attributed with holding that since the entrapment defense is not of constitutional proportions, the entrapment test used by the Supreme Court is not binding on state courts. Nonetheless, outrageous conduct of police officers may constitute a due process violation and give rise to a valid constitutional claim. 411 U.S. at 433. The recent case of State v. Matheson, 363 A.2d 716 (Me. 1976), indicates that the state courts may follow the lead of the Supreme Court even though the defense is not of constitutional proportions. *See* also *infra* notes 136-40 and accompanying text.

[132] Comment, *Constitutional and Legislative Issues Raised by the Entrapment Defense in Maine*, 29 MAINE L. REV. 170, 175 (1977) [hereinafter cited as *Entrapment in Maine*].

[133] W. LAFAVE & A. SCOTT, *supra* note 9, § 48, at 372; *Entrapment in Maine, supra* note 132, at 176. *See also* Fletcher, *supra* note 12, at 923, where he states: "If one excuses a girl who succumbs to an offer of prostitution, one should also excuse officials who are seduced by attractive bribes. Thus entrapment may not be an excuse at all; properly construed it may be a device designed solely to discipline police behavior."

[134] *Entrapment in Maine, supra* note 132, at 177.

[135] *See* notes 35, 75-78 and accompanying text *supra*.

[136] A number of state and federal courts prior to *Mullaney* had required the prosecution to negate the defense of entrapment beyond a reasonable doubt. United States v. Groessel, 440 F.2d 602, 606 (5th Cir. 1971); United States v. Brown, 421 F.2d 1283, 1284 (9th Cir. 1970); Martinez v. United States, 373 F.2d 810, 812 (10th Cir. 1967); Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967); State v. Murphey, 21 Ore. App. 630, 535 P.2d 779 (1975); State v. Curtis, 542 P.2d 744, 746 (Utah 1975); State v. Amundson, 69 Wis.2d 554, 564-65, 230 N.W.2d 775, 781 (1975). *Contra*, Brown v. State, 310 A.2d 870, 871 (Del. Sup. Ct. 1973); State v. Taylor, 260 Iowa 634, 646, 144 N.W.2d 289, 296 (1966).

[137] 363 A.2d 716 (Me. 1976).

Maine Supreme Judicial Court applied the subjective test to the facts involved. In *Matheson,* a police informer who had previously been a friend of the defendant approached the defendant and asked him where he could obtain drugs. Matheson led them to an individual who said they could obtain "five hits of mescaline" for ten dollars. An undercover agent who accompanied the informer then supplied money for purchase of the drugs. Matheson was later charged with selling LSD-25 (D-lysergic acid diethylamide) and moved for acquittal on the ground of entrapment.[138] The Court held that the *Mullaney* rule applied to the subjective approach of entrapment because predisposition was a fact critical to criminal culpability and predisposition was a fact to be considered by the jury in determining Matheson's guilt or innocence.[139] Arguably, had the Maine Court instead recognized the objective approach to entrapment, which judges the activities of law enforcement officers, the blameworthiness of the individual (found important in *Mullaney*) would have been reduced to such a minimum factor under the entrapment examination as to allow the state to constitutionally place the burden of persuasion on the defendant.[140]

Adoption of the subjective test has, however, been criticized on policy grounds. One author said:

> The subjective test is distinctly ill-suited to [deter excessive police activity] because acceptable levels of police conduct vary depending upon the degree of the defendant's subjective predisposition. By requiring the introduction of collateral issues necessary to prove predisposition, the subjective test ignores the nature of the police conduct once predisposition is established.[141]

The Model Penal Code states in support of the objective test that: "It is the attempt to deter wrongful conduct on the part of the government that provides the justification for the defense of entrapment, not the innocence of the defendant."[142] Some courts, although not having found entrapment under the majority view, have nevertheless found it on policy grounds using their federal supervisory power, as where an informer hired on a contingent fee basis was used to supply information concerning a particular person.[143] Nevertheless, the subjective approach to the entrapment defense continues

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[138] *See* ME. REV. STAT. ANN. tit. 22, § 2212-C (1964).

[139] 363 A.2d at 722. *See also* Sherman v. United States, 356 U.S. at 377.

[140] *See generally* Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant,* 64 GEO. L. J. 871 (1976).

[141] *Entrapment in Maine, supra* note 132, at 193.

[142] MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).

[143] Bullock v. United States, 383 F.2d 545 (5th Cir. 1967); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962). These cases, however, did not reject the majority approach. *See* W. LAFAVE & A. SCOTT, *supra* note 9, § 48, at 373 n.24.

to be the majority position and the courts seem willing to continue implying the defense of entrapment into the criminal statutes that come before them.

C. *Self-Defense*

The excuse of self-defense exists because of an assumption that it is only just for a person who has no opportunity to resort to the law for his defense to be able to take reasonable steps to defend himself from unlawful physical harm.[144] However, for the defendant to claim self-defense as an excuse for assault, he must actually believe there is a necessity for force and that the unlawful violence is imminent or immediate.[145] The conflict involves the determination of who has the burden of persuading the fact-finder that the defendant acted in self-defense. A number of interests are involved.

The majority view is that the prosecution bears the burden of proving the defendant did not act in self-defense, and that the state may place only the burden of going forward with evidence on the defendant.[146] Only a small minority of courts have placed the burden of proving self-defense by a preponderance on the defendant.[147] One explanation for placing the burden on the defendant is that by asserting the defense, the defendant is admitting facts which absent excuse or justification would constitute unlawful homicide.[148] This view has been rejected by some authorities because it attempts to carry over the "confession and avoidance" rationale of civil cases into the criminal law field.[149] Another explanation is that the state courts are intent on adhering to the traditional common law model where

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[144] W. LAFAVE & A. SCOTT, *supra* note 9 § 53, at 391. Self-defense is used in the strict sense here to exclude analysis of policies involving defenses of other persons or the defense of habitation. For burden of proof in self-defense claims generally, see 40 AM. JUR. 2d *Homicide* § 248 (1968).

[145] *See* Wallace v. United States, 162 U.S. 466 (1896); Beard v. United States, 158 U.S. 550, 560 (1895).

[146] DeGroot v. United States, 78 F.2d 244 (9th Cir. 1935); Frank v. United States, 42 F.2d 623 (9th Cir. 1930); State v. Millet, 273 A.2d 504, 507 (Me. 1971).

[147] Long v. State, 3 Md. App. 638, 240 A.2d 620 (1968); Szalkai v. State, 96 Ohio St. 36, 117 N.E. 12 (1917); Commonwealth v. Winebrenner, 439 Pa. 73, 265 A.2d 108 (1970); State v. Ballou, 20 R.I. 607, 40 A. 861 (1898); State v. Dillard, 59 W. Va. 197, 53 S.E. 117 (1906); State v. Manns, 48 W. Va. 480, 37 S.E. 613 (1900).

[148] Commonwealth v. Winebrenner, 439 Pa. at 85, 265 A.2d at 114.

[149] *See* Pounders v. State, 282 Ala. 551, 552, 213 So.2d 394, 395 (1968), in which the Court stated: "A plea of self-defense in a criminal trial is not an affirmative plea of confession and avoidance on which defendant has the burden of proof as he does on such a plea in a civil case." *See also* Fletcher, *supra* note 12, at 910, where he explains the historical background of the confusion:

> Before the turn of the 20th century, jurists in both common law and Continental jurisdictions approached decisions on the burden of persuasion in criminal cases as they did in private disputes, and in doing so they devised rules of criminal liability that had the form of the rules used in settling private disputes.

the burden of persuasion was placed on the defendant.[150] Finally, at least one court has expressed the view that because self-defense is similar to excuse by necessity, defendant should bear the burden of persuasion by the greater weight of the evidence.[151]

The majority view is also supported by a number of interests. The most frequent explanation for imposing the burden on the state to prove that the defendant did not act in self-defense is that it will reduce jury confusion.[152] If the burden of persuasion is on the defendant, then the court must instruct the jury that the defendant bears the burden of proving by some standard that he acted in self-defense while the prosecution has the burden of showing that the defendant is guilty of the crime beyond a reasonable doubt. In *State v. Malone,*[153] the Missouri Supreme Court found that self-defense went to the element of malice which the state was required to prove beyond a reasonable doubt, and that a jury instruction which placed the burden of proving self-defense on the defendant could not be cured by a concluding statement in the instruction that placed the burden of proving guilt on the prosecution. The court stated:

> A lawyer might work out a construction to reconcile and harmonize that positive direction with the concluding sentence and the presumption of innocence to which the defendant is entitled, but it is not likely a jury of laymen could do so. To say the best of it, the instruction was likely to be misunderstood by, and to mislead the jury.[154]

The confusion which can be generated by placing the burden of proving self-defense by a preponderance on the defendant is not, however, a peculiarity of those cases where self-defense relates to an element of the crime.[155]

Another argument supporting the majority view is that self-defense may negate an element of the offense such as malice or may "refute the unlawfulness of the killing itself," and thus set a foundation for application of

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[150] Quillen v. State, 49 Del. 114, 110 A.2d 445 (1955) (in which the Court noted its homicide law was based in general on the common law of England as it existed in 1776, and that the burden under the common law was placed on the defendant); Commonwealth v. Winebrenner, 439 Pa. 73, 265 A.2d 108 (1970).

[151] State v. Osborne, 202 S.C. 473, 25 S.E.2d 561, *cert. denied,* 320 U.S. 763 (1943).

[152] State v. Millet, 273 A.2d 504, 507 (Me. 1971).

[153] 327 Mo. 1217, 39 S.W.2d 786 (1931).

[154] *Id.* at 1228, 39 S.W.2d at 790; *see* Leonard v. People, 149 Colo. 360, 369 P.2d 54 (1962) (where the Court determined that the effect of forcing the defendant to rebut the inference of malice was to create a jury instruction placing the burden upon him to prove no crime was committed).

[155] *See* Gunther v. State, 228 Md. 404, 179 A.2d 880 (1962) (where the court was held to have instructed the jury, in effect, that the trier of fact could weigh the evidence of self-defense alone to reach a determination of guilt).

Mullaney.[156] Some courts have construed the defense similarly to the denial of alibi,[157] saying that the defense goes to the crime itself, and that the state should bear the burden of persuasion because "[i]t is upon the State to prove beyond a reasonable doubt that the killing was feloniously and criminal and was not therefore done in self-defense."[158] This argument is apparently based on the rationale that in order for a state to use its coercive powers against a person, that person must be "morally blameworthy."[159] This rationale has been viewed as the foundation for the *Winship* decision and is recognized as being the predominant modern concern in applying punishment.[160]

More important, it has been suggested that if self-defense significantly reduces or eliminates punishment to be imposed for an offense, *Mullaney* should apply to self-defense regardless of whether self-defense relates to an element or to the felonious nature of the crime as a whole.[161] The United States Supreme Court has not yet addressed the issue. The only self-defense case involving *Mullaney* questions which has come before the United States Supreme Court is *State v. Hankerson*.[162] in which the North Carolina Supreme Court, while refusing to apply *Mullaney* retroactively, determined in accordance with the *Mullaney* Court, that mandatory presumptions which place the burden of persuasion on the defendant to show the absence of malice or unlawfulness in homicide cases are improper when the issue of their existence is raised by the evidence. The North Carolina Supreme Court stated, "the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and

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[156] *See Unburdening the Criminal Defendant, supra* note 22, at 406. The *Mullaney* Court expressly stated that placing the burden of proving a negative on the prosecution with respect to self-defense did not put too onerous a burden on the prosecution. 421 U.S. at 703 n.31.

[157] *See* notes 167-171 and accompanying text *infra*.

[158] State v. Carter, 227 La. 820, 827, 80 So. 2d 420, 423 (1955). *See* State v. Conda, 156 La. 679, 680, 101 So. 19, 20 (1924). Note the definition of "felonious" in Black's Law Dictionary 743-44 (rev. 4th ed. 1968):

> A technical word of law which means done with intent to commit crime; of the grade or quality of a felony; such an assault on the person as, if consummated, would subject party making it, on conviction, to punishment of a felony. . . . Malicious, villainous; traitorous. . . . Malignant. . . . Wrongful. . . . Proceeding from an evil heart or purposely. Wickedly and against the admonition of the law; unlawfully. . . .

[159] *See* Fletcher, *supra* note 12, at 890:

> To treat two men alike, one who has caused harm culpably and the other who has done so without culpability, is to ignore a morally significant distinction between them. . . . The postulate that only the blameworthy should suffer under the criminal law becomes a standard for fairly and equally distributing the burdens of criminal sanctions.

[160] Comment, *Affirmative Defenses After Mullaney v. Wilbur: New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171, 190 (1976).

[161] *See Unburdening the Criminal Defendant, supra* note 22, at 407.

[162] 288 N.C. 632, 220 S.E.2d 575 (1975).

unlawfulness beyond a reasonable doubt,"[163] indicating that the Court had held the presumptions to be elements of the crime of murder in the same way the *Mullaney* Court had found malice to be an element of murder. However, the North Carolina Supreme Court found no reversible error in the decision of the lower court. The case was subsequently reversed by the United States Supreme Court on the ground that *Mullaney* was to be applied retroactively and that the trial court proceedings threatened "substantial impairment" of the truth-determining process and inaccuracy in the guilty verdict because the defendant had been forced to bear the burden of proving self-defense without considering whether this practice was permissible under *Mullaney*.[164] However, the United States Supreme Court did not determine whether proof of self-defense went to an "element" of the crime.[165]

D. *Alibi*

Although alibi has often been characterized as an affirmative defense, it is not really a defense to the crime but a denial that one participated in the crime at all.[166] Nevertheless, alibi is treated similarly to other defenses when the state is engaged in determining on whom the burden of persuasion will be placed. Because its treatment is indicative of the balancing of interests approach analyzed here, a discussion of alibi is essential.

The leading case in the area is *Stump v. Bennett*,[167] a habeas corpus proceeding involving the question of whether a state trial court could properly place upon the defendant the burden of proving his sole defense of alibi by a preponderance.[168] The Court reasoned that alibi relates to the presence of the defendant at the scene of the crime and that, therefore, "[p]roof of the defendant's presence and participation is a wholly indispensable factor to the government's case; it is a sine qua non to sustain a verdict of guilty."[169]

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[163] 288 N.C. at 651, 220 S.E.2d at 589.

[164] North Carolina v. Hankerson, 432 U.S. 233 (1977).

[165] *See* notes 42-47 and accompanying text *supra*. The Supreme Court noted that the State did not argue that "despite *Mullaney v. Wilbur* it is constitutionally permissible for a State to treat self-defense as an affirmative defense that the prosecution need not negative by proof beyond a reasonable doubt. Therefore, we do not address that issue in this case." 97 S.Ct. at 2344 n.6. This indicates that the Supreme Court may have been concerned only with a narrower "elements" approach examination in the Hankerson case, although that concern did not play a part in the final decision of the case.

[166] MCCORMICK, *supra* note 9, § 341 at 801; W. LAFAVE & A. SCOTT, *supra* note 9, § 47, at 359 n.19. *But see* People v. Silvia, 389 Ill. 346, 59 N.E.2d 821 (1945). Generally, affirmative defenses do not relate to the substance of the crime, but to its inculpating character.

[167] 398 F.2d 111 (8th Cir. 1968), *cert. denied*, 393 U.S. 1001 (1968). That same year the United States Supreme Court remanded Johnson v. Bennett, 393 U.S. 253 (1968), an alibi case, to the Eighth Circuit for reconsideration under *Stump*.

[168] 398 F.2d at 113. In 1968, two states, Iowa and Georgia, still placed the burden of persuasion on the defendant to prove his alibi defense by a preponderance. *Id.* at 114.

[169] *Id.* at 119-20.

The Court considered it a violation of due process under the fourteenth amendment to shift to the defendant the burden of disproving "essential elements of a crime."[170] This view indicates that an element could be as broad as the crime itself, a concept apparently envisioned by the majority decision in the *Winship* opinion. However, it also supports the broad interpretation of *Mullaney* that any matter affecting guilt under the statutory crime relates to an "element" of the crime.[171]

One argument for placing the burden of persuasion on the state is an argument that has been used to justify placing the burden of negating self-defense on the state. That is, placing the burden on the defendant leads to jury confusion because of the problem of instructing the jury that even though the defendant bears the burden of proving he was somewhere else when the crime was committed, the prosecution bore the burden of proving beyond a reasonable doubt that the defendant committed the crime.[172] This argument was raised in Smith v. Smith,[173] a Fifth Circuit case finally resolving the alibi issue in the state of Georgia, which was the last state to retain the rule that the defendant should prove alibi by a preponderance of the evidence. The Court repeated the rationale of *Stump*, saying that to require the defendant to prove alibi will result in a shift of the burden of proof as to essential elements of the crime and will render the trial fundamentally unfair. The court also commented on the confusing jury instruction that the jury be "reasonably satisfied" with the alibi evidence presented by the defendant and stated:

> Although it is possible that the Georgia charge does not require a preponderance of the evidence, the fact of which even Georgia courts are not convinced, we find the actual standard utilized to be immaterial. It is enough to say that it is clear that Georgia defendants have *some* burden on their alibi defense.[174]

Smith overruled *Thornton v. State*[175] and the line of cases in Georgia which had held alibi to be an affirmative defense, and thereby had required the defendant to prove alibi by a preponderance.

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[170] *Id.* at 118.

[171] *See* notes 42-47 and accompanying text *supra*. *Patterson* remains intact under this view because the question of guilt is settled prior to submitting evidence in mitigation of the crime. The question of mitigation is not an indispensable factor in the government's case.

[172] *See Texas Penal Code Defenses, supra* note 98, at 125.

[173] 454 F.2d 572 (5th Cir. 1971), *cert. denied* 409 U.S. 885 (1972).

[174] *Id.* at 577-78. The Court added: "The quantum of proof required of the defendant is not clear. The defendant clearly is not required to prove his alibi beyond a reasonable doubt. . . . There has, however, been some question in the past as to whether defendant must prove his alibi by a preponderance of the evidence." *Id.* at 578 n.2.

[175] 226 Ga. 837, 178 S.E.2d 193 (1970).

There is one inconsistency in the reasoning that presence at the scene of the crime is a sine qua non of conviction. Courts considering the issue of alibi have traditionally refused to instruct the jury that the defendant could be found innocent if he generated a reasonable doubt in their minds as to his presence at the crime itself.[176] The courts so holding have generally based their decisions on the rationale that the jury must consider the totality of the evidence in determining whether they have a reasonable doubt as to the defendant's guilt. If alibi were a sine qua non of conviction, then it seems that a jury verdict in favor of the defendant on that issue alone would be permissible. It is crucial to recognize that if a state considers presence as being one of the facts necessary for conviction, whether expressed or implied in the particular statute involved, then *Winship* requires proof beyond a reasonable doubt of the separate fact of presence in order to convict.[177] Therefore, at least under *Winship,* presence can be recognized as a sine qua non of conviction. However, the line of cases restricting the jury to a consideration of the totality of the evidence has not been overruled.[178]

E. *Accident*

In alleging that a crime occurred accidentally, the defendant can raise either the defense that the crime occurred without the necessary mental element, or the affirmative defense that the factual aspects of the crime charged against him did occur but that no criminal liability should attach because he was engaged in a lawful activity and was guilty of no culpable conduct. In those states with statutes which place the burden of persuasion on the defendant to prove affirmative defenses if he chooses to alleviate or mitigate the crime of homicide, the courts have split on whether such statutes are applicable to the defense of accident. Courts which have placed the burden upon the defendant to prove accident have done so on the basis of a rationale similar to that used in placing the burden on the defendant in self-defense cases. That is, some courts have recognized that the defendant is admitting the facts of the crime and, therefore, he should bear the burden of proving any excuse or mitigation of the act.[179] Some have placed the burden on the defendant because in the case

[176] Johnson v. State, 223 Ala. 332, 135 So. 592 (1931); Nichols v. State, 27 Ala. 435, 173 So. 652 (1937); Solomon v. State, 44 Ga. App. 755, 162 S.E. 863 (1932); People v. Lacey, 339 Ill. 480, 171 N.E. 544 (1930); Flanagan v. People, 214 Ill. 170, 73 N.E. 347 (1905); Jenkins v. State, 22 Wyo. 34, 134 P. 260 (1913).

[177] *Winship* required proof beyond a reasonable doubt of "every fact" necessary to constitute the crime. *See supra* note 23 and accompanying text.

[178] *See Annot.,* 124 A.L.R. 471, 475 (1940).

[179] Jimmerson v. State, 169 Ark. 353, 275 S.W. 662 (1925); Chandle v. State, 230 Ga. 574, 198 S.E.2d 289 (1973); People v. Slaughter, 29 Ill. 2d 384, 194 N.E.2d 193 (1963), *rev'd on other grounds,* 39 Ill. 2d 278, 235 N.E.2d 566 (1968); People v. Franklin, 390 Ill. 108, 60 N.E.2d 870 (1945); People v. Morrison, 52 Ill. App. 2d 9, 201 N.E.2d 639 (1964).

of homicide, death by means of a deadly weapon does not normally occur by accident.[180] It is also common for state courts to place the burden on the prosecution because, irrespective of the statute involved, it is incumbent on the prosecution to show that killing was done intentionally.[181] Irrespective of a state statute imposing the burden of establishing the facts of an excuse or justification on the defendant, the prosecution has been required to take the burden of proving a non-accidental situation where the defendant, in pleading not guilty to the offense, relied upon no facts separate from those of the offense itself.[182]

It is to be noted that the same problems with respect to jury confusion exist in the case of accident as in other defenses where the courts have determined that the defendant bears the burden of proving his defense by a preponderance. A double problem exists when accident and self-defense are pled as defenses in the same case. If the prosecution bears the burden of proving the negative on both issues, no problem is apparent. However, where the defendant bears the burden on both issues, he is in the unenviable position of being forced to prove, in the case of self-defense, that the act was intentional and justified and, in the case of accident, that the act was unintentional. A jury instruction has been considered grounds for reversal where the concepts are intermingled,[183] yet the danger of confusion pre-

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[180] *See* Partin v. Commonwealth, 445 S.W.2d 433 (Ky. 1969), in which the court also stated that even if accident should be shown, a killing would not normally occur except in the case of the highest degree of negligence. *Id.* at 436.

[181] State v. Graffam, 202 La. 869, 13 So. 2d 249 (1943); State v. Phillips 264 N.C. 508, 142 S.E.2d 337 (1965) (stating that while accident is a denial of the crime, it could be refuted by the prosecution's proof of intention); State v. Oakes, 129 Vt. 241, 276 A.2d 18, *cert. denied,* 404 U.S. 965 (1971). *See also* Jones v. State, 51 Ohio St. 331, 38 N.E. 79 (1894), in which the Court stated:

> This language [of the statute], while it supports the proposition that one shall be held to intend to do that which his deliberate acts necessarily or naturally tend to produce, it affords no support for the contention that he shall be held to intend the consequences of all of his acts, irrespective of whether those acts were voluntary or involuntary, and that the burden is on him to show that he did not.

Id. at 344, 38 N.E. at 83.

Note that OHIO REV. CODE ANN. § 2901.21 (A) (1) (Page 1975) requires that the defendant's criminal "liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing." If the defendant can successfully contend that the facts on which he relies for his defense of accident also show that the allegedly "criminal" act was not done voluntarily, he has one more argument for placing the burden on the prosecution to show non-accident. It is absurd to suppose that the prosecution has the burden of proving the elements of the crime but not criminal liability itself. A similar argument would arise if the defendant could successfully contend that the facts on which he relies for his defense of self-defense indicate that the allegedly "criminal" act was done involuntarily. *See* notes 241-246 and accompanying text *infra.*

[182] Richardson v. State, 32 Tex. Crim. 524, 24 S.W. 894 (1894). *Contra,* Bussey v. State, 147 Tex. Crim. 447, 181 S.W.2d 94 (1944).

[183] State v. Ferguson, 91 S.C. 235, 74 S.E. 502 (1912). The latter problem may not exist in Ohio, since a recent Ohio case considers accident to be a defense which relates to the element of intention, to be proved by the prosecution. State v. Poole, 33 Ohio St. 2d 18,

sented in this circumstance has never been successfully used as a rationale to shift the burden of persuasion to the prosecution on both issues where both defenses are considered affirmative defenses.

F. *Other Interests*

One of the largest conflicts between *Mullaney* and *Patterson* stems from each opinion's consideration of the burden placed on the state, not in the theoretical sense of whether the burden of going forward or the burden of persuasion is required, but in the practical sense of the difficulty in gathering and presenting evidence to prove a fact of the crime.[184] The rule favored in *Patterson* is "[a] doctrine often repeated by the courts [that] where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."[185]

The claim that the defendant's superior access to evidence justifies shifting the burden to him to prove the fact in mitigation, justification or excuse of the crime plays an important role in defenses other than those of insanity or mental distress.[186] For instance, in the case of *State v. Rowe*,[187] the defendant pled that he could not be guilty of embezzlement because he was under the age required to sustain a conviction pursuant to the state statute creating the general offense of embezzlement. The Maine Supreme Court said:

> Therefore, in a situation where the facts relating to the exception are difficult for the state to obtain and are at the same time peculiarly within the knowledge of the defendants, the exception is usually considered as a defense or jusification and not as a part of the description of the offense itself.[188]

This resulted in placing the burden of persuasion on the defendant to prove

294 N.E.2d 888 (1973). However, if self-defense were considered an affirmative defense on which the defendant bore the burden of persuasion, the problem of jury confusion discussed earlier would still exist. *See* notes 152-55 and accompanying text *supra*.

[184] *See* notes 70-74 and accompanying text *supra*.

[185] MCCORMICK, *supra* note 9, § 337, at 787. Professor McCormick views the rationale as being of decreasing importance:

> Expanded pretrial discovery would seem to have diminished greatly whatever importance this factor had in allocating the burdens. However, there has been no rush by the courts to reassess allocations between the parties in light of expanded discovery, perhaps attesting to the fact that exclusive knowledge in one party has seldom been the controlling reason for assigning the burdens of proof.

Id. at 787 n.19. There may, however, be peculiar problems involved in the defenses of insanity and mental distress that cannot be sufficiently alleviated by pretrial discovery. *See* notes 118-20 and accompanying text *supra*.

[186] *See* notes 118-20 and accompanying text *supra*.

[187] 238 A.2d 217 (Me. 1968).

[188] *Id.* at 222, *quoting* Williams v. United States, 138 F.2d 81, 82 (D.C. Cir. 1943).

his true age. The argument that defendant's superior knowledge of a fact justifies placing the burden of persuasion on him has the advantage of eliciting relevant evidence that the state would otherwise be unable to acquire.[189] Therefore, shifting the burden in such cases mitigates the probability of erroneous convictions based upon factual errors. Unfortunately, however, the argument has been used to shift the burden as to facts which are rightfully within the knowledge of the defendant even though the state has not claimed inaccessability to the same knowledge.[190]

A closely related justification for shifting the burden is not that the facts are peculiarly within the knowledge of the defendant, but that probabilities are great that the defense would never exist. Professor Cleary has noted that in determining this issue, the courts will either consider the probabilities generally, or will consider the probabilities in prior litigated cases specifically, that the event from which the defense arises is an unusual one. He has indicated that the courts are on much safer ground when using litigated cases as the basis for estimating the probabilities.[191] However, even if the more reliable universe of litigated cases is adopted, it is difficult to see how the statistical analysis approach helps to solve either aim of *Mullaney,* to help reduce the number of convictions based upon factual errors or to increase the integrity of and respect for the judicial process. But if a statistical analysis is not used, the measure of an "unusual" defense is unclear. A second problem is that the logical result of this analysis is to place a doubly heavy burden on the defendant, since in addition to bearing the burden of proof on the issue, the fact finder will be justifiably skeptical that the event in question ever occurred.[192]

Apart from these formulations, courts have based their rules for either shifting the burden to the defendant or leaving that burden on the prosecution upon the nature of the specific defense alleged. For instance, because an intoxicated person may have been in such a condition that he arguably could not have formed the requisite criminal intent to be criminally responsible for his acts, the prosecution has often borne the burden of showing he is morally

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[189] For other defenses in which the defendant has superior knowledge, *see generally* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L. J. 1299, 1333-36 (1977).

[190] People v. Dean, 131 Cal. App. 228, 234, 21 P.2d 126, 128 (1933). Fletcher, *supra* note 12, at 909, indicates that the argument is based primarily on the common law practice of interweaving pleading rules with burden concepts, often resulting in injustice to a particular defendant. *See* MCCORMICK, *supra* note 9, § 337, at 785-86.

[191] Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 12-14 (1959). *See also* MCCORMICK, *supra* note 9, § 337, at 787.

[192] Underwood, *supra* note 189, at 1337-38.

blameworthy.[193] The Model Penal Code has, at times, placed the burden of persuasion on the defendant merely out of compromise, as in the case of corporate exculpation from products liability.[194] It has been noted that such a rule is desirable because corporations should not be held liable where they have exercised due diligence and the courts should not have to prove lack of due diligence in every case before them. The rule reduces the possibility of factual error and increases judicial efficiency.[195] The courts have, however, required the defendant to bear the burden of persuasion when he challenges the unconstitutionality of a statute under which he has been charged for the twofold reason that statutes promulgated by the state are presumed to be valid and that the courts are generally reluctant to declare acts of the legislature unconstitutional.[196]

III. SHIFTING THE BURDEN OF PROVING SELF-DEFENSE IN OHIO

The general considerations affecting burden allocation that should be included in the balancing type of process favored by the Supreme Court in *Mullaney* and *Patterson* have already been discussed.[197] However, there are a number of considerations peculiar to Ohio law that must be weighed by the courts and the legislature in determining whether it is constitutional to shift the burden of proof of self-defense by any standard of proof to the defendant.

The Ohio Supreme Court has recognized that self-defense is not merely an excuse to unlawful homicide, but a justification for the homicide barring application of criminal sanctions.[198] That this rule has a constitutional foundation was pointed out in *Erwin v. State,*[199] a case in which the victim's death was caused by a shot from a pistol and the testimony indicated the homicide resulted from a sudden quarrel and was done in defense of the defendant's person and property.[200] While the court noted that the common law had separated "homicide from necessity" into two categories, homicide which was justifiable and homicide which was excusable, it said that the distinction was not important in Ohio since "[i]t is true, under our con-

[193] People v. Evrard, 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965). *Contra,* State v. Hill, 46 La. Ann. 27, 14 So. 294 (1894). A defendant is guilty if he is found criminally liable, but he is blameworthy if he morally deserves punishment. In the case of strict liability, a defendant may be found criminally liable for committing the crime though not morally blameworthy.

[194] MODEL PENAL CODE § 2.07 (5) (1962).

[195] W. LAFAVE & A. SCOTT, *supra* note 9, § 8, at 49.

[196] *See* Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957).

[197] *See* notes 144-65 and accompanying text *supra.*

[198] Marts v. State, 26 Ohio St. 162 (1875).

[199] 29 Ohio St. 186 (1876).

[200] *Id.* at 190.

stitution, whether the killing in self-defense be justifiable or excusable, there must be an entire acquittal, for the reason that there is no forfeiture of goods in cases of excusable homicide."[201] The failure to give weight to the distinction is consistent with the king's treatment of excusable homicide under the common law. As one author notes, pardons for excusable homicide were eventually offered as a matter of course and the practice of confiscating goods and chattels of one found guilty of excusable homicide fell into disuse.[202]

The rule established by *Erwin* in 1876 has been left unchanged by present judicial decisions, indicating that the justification of self-defense in Ohio is not a recent invention of the legislature as was the mitigating factor in *Patterson,* but a historical defense similar to heat of passion in *Mullaney.* A second consideration supported by these cases is the widely divergent consequences to the defendant if the burden of proving self-defense is shifted to him. If he fails in proving self-defense, the maximum penalty is death, but if he succeeds he will be acquitted.[203] These consequences are more divergent than those to be suffered by the defendant in *Mullaney* and far more divergent than the consequences to the defendant in *Patterson.*[204]

An historical review of the Ohio statutes proscribing murder indicates that from the earliest Ohio legislation, self-defense related to an element of the crime. The murder statute enacted by the First Session, Third Assembly of the Ohio legislature in 1804 stated that no person "of sound memory and discretion, shall *unlawfully* kill any human being . . . with malice aforethought, either express or implied."[205] The word "unlawful" remained in the Ohio murder statute until 1814, when the statute required that no person "shall purposely, *of deliberate and premeditated malice,* or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, kill another . . . ."[206]

The Ohio cases construing the "malice" wording in Ohio statutes subsequent to that time have, however, noted that this wording still means the

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[201] *Id.* at 199. Under English law, one found guilty of excusable homicide forfeited his goods and his chattels. R. PERKINS, CRIMINAL LAW 1001 (2d ed. 1969).

[202] R. PERKINS, *supra* note 201, at 1001.

[203] *See* OHIO REV. CODE ANN. § 2929.02(A) (Page 1975), allowing the death penalty to be imposed for aggravated murder, and § 2929.03(A) (Page 1975), allowing imposition of life imprisonment when murder is committed.

[204] *See* note 38 *supra.* In *Patterson,* the maximum penalty ranged between 25 years imprisonment and life imprisonment, depending on whether the mitigating factor was proven. N.Y. PENAL LAW § 70.00 (McKinney 1975).

[205] 3 LAWS OF OHIO 2 (emphasis added).

[206] 13 LAWS OF OHIO 86. (emphasis added).

killing must be an "unlawful" one.[207] The significance of this fact is that for well over a century and a half, both the Ohio legislature and the Ohio courts recognized that the crime of murder should contain an element negating the defense of self-defense. An application of *Mullaney* to the Ohio statutes existing until 1974 would have led to the conclusion that because "unlawfulness" was an element of the crime of murder, whether expressly or by implication, the prosecution should therefore bear the burden of establishing that the defendant was not entitled to acquittal on the basis of self-defense.

The requirement of "malice" remained in the Ohio murder statute until 1974, when the murder statute in Ohio was changed to read, "No person shall purposely cause the death of another."[208] Yet, the serious question arises of whether the "unlawfulness" element should still be read into the murder statute under a theory similar to that used in the case of the "implied exception" for entrapment or that used in finding that alibi negates an "element" of the crime.[209] One such theory was raised by Justice Whiteside in his concurring opinion in *State v. Robinson,*[210] in which he stated:

> With respect to self-defense, unlike insanity, the defense is not considered by the jury only after it has found that all elements of the offense, including *mens rea,* if required, have been proven beyond a reasonable doubt. Rather, the existence or nonexistence of self-defense bears a direct relationship to the existence or nonexistence of the required mental elements of the crime. Although *Mullaney* is factually distinguishable, I can find no logical justification for placing the burden of proving self-defense upon the defendant, if placing the burden of

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[207] State v. Childers, 133 Ohio St. 508, 14 N.E.2d 767 (1938) (indictment charging "unlawful" homicide need not state it was done "maliciously"); State v. Esherick, 19 Ohio App. 2d 40, 45, 249 N.E.2d 78, 82 (1969) ("[murder] in the second degree is the unlawful, malicious and intentional killing of a human being"); Zeltner v. State, 13 Ohio C.C. (n.s.) 417, 426-27 (Wood County 1899), *aff'd,* 62 Ohio St. 655, 58 N.E. 1103 (1900) (proper charge to jury contained the word "unlawful"); State v. Miller, 7 Ohio N.P. 458 (Seneca County 1895) (proper charge to jury contained the word "unlawful"). *See also* R. PERKINS, *supra* note 201, at 334, where he explains 'that 'malice', as it is generally used in the law, means intentional harm caused without lawful justification or excuse," indicating that self-defense can be considered a defense to malice just as it can be to unlawfulness.

[208] OHIO REV. CODE ANN. § 2903.02(A) (Page 1975). "Aggravated murder" was defined to require that a person had "purposely, and with prior calculation and design, cause[d] the death of another." OHIO REV. CODE ANN. § 2903.01 (A) (Page 1975). The wording "with prior calculation and design" was not a substitute for the word "malice" but an explanation of the premeditation and deliberation required for the crime. The Ohio Supreme Court noted in State v. Toth, 52 Ohio St. 2d 206, 217, 371 N.E.2d 831, 837-38 (1977): "In Patterson v. New York . . . the Supreme Court of the United States expressly upheld the right of the state of New York to exclude malice aforethought as one of the elements of the crime of second degree murder."

[209] *See* notes 134, 171 and accompanying text *supra.*

[210] 48 Ohio App. 2d 197, 206, 356 N.E.2d 725, 731 (1975).

> proving that he acted in the heat of passion on sudden provocation is unconstitutional.[211]

Although it is suggested that self-defense bears upon the required mental elements of the crime, there is no basis in Ohio's statutory definition of "purposely" for concluding that "purpose" can be found only by negating the facts constituting self-defense. The statute defining "culpable mental states" provides that "[a] person acts purposely when it is his specific intention to cause a certain result . . . ."[212] This approach to culpability seems to be result-oriented and motive becomes irrelevant to guilt. That the legislature nevertheless felt that self-defense should have some bearing upon the mental aspect of murder is indicated by its Committee Comment to Ohio Revised Code section 2901.21, in which it stated that an essential part of any crime must be "a certain guilty state of mind at the time of his act or failure."[213] Because self-defense is a justification evidencing a non-culpable state of mind, an element of "unlawfulness" must be read into the statute to reflect legislative intent. This being so, the burden of persuasion must then shift to the prosecution to prove the lack of self-defense.

A second theory for reading "unlawfulness" into the Ohio murder statute is that the English common law required murder to be an unlawful

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[211] *Id.* at 209, 356 N.E.2d at 732.

[212] OHIO REV. CODE ANN. § 2901.22 (A) (Page 1975). Lord Justice Asquith noted in Cunliffe v. Goodman, 1 All E.R. 720, 724, 2 K.B. 237, 253 (1950):

> An intention to my mind, connotes a state of affairs which the party "intending"—I will call him X—does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition.

It would be difficult to argue that a person acting in self-defense does not have an "intention" to cause serious injury or death. *See* State v. Long, 53 Ohio St. 2d 91 (1978), in which Justice Parrino said in his concurring opinion: "Appellant specifically testified that he did not intend to shoot or kill the victim or his companion. This state of mind rebutted rather than supported the theory that he was acting in self-defense." *Id.* at 100. The Committee Comment to § 2901.22 (A) equated "purposely" with "willfully." Perhaps one could argue that in order for the state to show the death was caused "willfully" it would have to prove that the act was not done in self-defense.

[213] OHIO REV. CODE ANN. § 2901.21 Committee Comment (Page 1975). The legislature also stated: "Although the case law is not entirely clear, the apparent rule is that even if the statute fails to specify any degree of culpable mental state, strict criminal liability will not be applied unless the statute plainly indicates that the legislature intended to impose strict liability." *Id. But see* State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), in which the Court stated, concerning criminal conspiracy:

> if, under the circumstances, it might be reasonably expected that the victim's life would be endangered by the manner and means of performing the criminal act conspired, each one engaged in the common design is bound by the consequences naturally or probably arising in its furtherance and, in case of death, would be guilty of homicide.

Id. at 61, 358 N.E.2d at 1071-72. While this wording seems to exclude consideration of a guilty state of mind, the court had already found that the defendant had a guilty state of mind and was only considering for what consequences she should be held liable.

act and this requirement has not been specifically abrogated by statute.[214] While the fact would seem irrelevant because of the Ohio Supreme Court's explicit determination that in this state all crimes are statutory and that there are no common law crimes or common law procedure in Ohio,[215] common law is still important in filling many of the gaps left in the criminal statutory scheme. In the recent case of *State v. Humphries,*[216] the Supreme Court of Ohio determined that the burden of persuasion as to lack of insanity was placed on the state. Justice Locher stated in his concurring opinion: "The General Assembly has the power to enact laws which modify or abrogate the common law . . . . However, the intention to modify or abrogate the common law must be manifested by express language of the statute. Abrogation of the common law by implication is not permitted, *Smith v. United Properties, Inc.*"[217] Since murder at common law was an "unlawful" act, it is submitted here that under the rule of statutory construction set forth by Justice Locher above, it would be impossible to exclude "unlawfulness" as an element of the crime except by explicit language in the murder statute. Yet, it is foolhardy to suggest that the legislature could either constitutionally or logically define murder as being a "lawful" act.[218] Therefore, "unlawfulness" must be viewed as an element of murder.

A third theory for reading the element of "unlawfulness" into the Ohio murder statute gains support from the Ohio Constitution, article IV, section 20 and the case law construing the effect of that provision. This section states: "The style of all process shall be, 'The State of Ohio'; all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude, 'against the peace and dignity of the State of Ohio.' "[219] The question arises whether, since a crime must be "against the peace and dignity of the State of Ohio," this wording becomes an element of the crime for *Mullaney* purposes. If the requirement is merely formalistic, it lends nothing to this analysis. However, if the fact that an

[214] Mullaney v. Wilbur, 421 U.S. at 693; W. LAFAVE & A. SCOTT, *supra* note 9, § 867, at 528; 4 BLACKSTONE COMMENTARIES 21 (1900), at which it is stated: "to constitute a crime against human laws there must be first a vicious will and second, an unlawful act consequent upon such vicious will."

[215] State v. Sales Book Co., 176 Ohio St. 482, 486, 200 N.E.2d 590, 594 (1964); State v. Huffman, 131 Ohio St. 27, 32, 1 N.E.2d 313, 315 (1936); State v. Schultz, 96 Ohio St. 114, 118, 117 N.E. 30, 31 (1917).

[216] 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977). *See* notes 116-17 and accompanying text *supra.*

[217] *Id.* at 110, 364 N.E.2d at 1363. This requirement is identical to that recognized by the legislature as a prerequisite to finding that a statute imposes strict liability. *See* note 213 *supra.*

[218] One suggestion is that the legislature could define murder to include a presumption of "unlawfulness," freeing the prosecution of the burden of persuasion on the issue, but the presumption would be subject to heavy scrutiny in light of *Leary v. United States* and *Mullaney. See* notes 236-38 and accompanying text *infra.*

[219] OHIO CONST. art. IV, § 20.

act was committed against the peace and dignity of the State of Ohio is an essential element of the crime, then the prosecution must bear the burden of persuasion on the issue since it must prove every essential element of the crime charged in the indictment.[220]

In *Hamilton v. Alvis*,[221] a case involving a defendant who was charged in an indictment for larceny which he alleged was defective in form, the court was forced to examine the question whether an averment of unlawfulness was also required to be stated in the indictment. The court found that "[t]he indictment concludes with the allegation that the criminal acts described were 'contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.' This is a clear allegation that the acts were unlawful."[222] If the state, in proving the allegedly criminal act was against the peace and dignity of the state of Ohio, must prove an act to be unlawful, then it must prove that the defendant did not commit the act in self-defense so as to justify his actions. In this case, the requirements for the form of the criminal indictment suggest that an additional element of "unlawfulness" must be read into the murder statute.

Other constitutional provisions from both the Ohio Constitution and the federal Constitution support the proposition that "unlawfulness" should be read as an element in the murder statute.[223] Article 1, section 1, of the Ohio Constitution provides in part: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and . . . obtaining . . . safety."[224] Thus, the state legislature can neither explicitly nor implicitly remove the right of a person to defend himself and a statute which leaves no room for assertion of the right would be clearly unconstitutional if so applied. Arguably, the

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[220] OHIO R. CRIM. P. 7 (B); 4 OHIO JURY INSTRUCTIONS, § 403.10a (Provis. 1974), which requires the standard jury instruction for burden of proof to be stated as follows:

> The defendant(s) is (are) presumed innocent until his (their) guilt is established beyond a reasonable doubt. The defendant(s) must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the crime(s) charged in the indictment (information) (or of any lesser offense included within that charge).

[221] 109 Ohio App. 298, 160 N.E.2d 372 (Franklin County 1959).

[222] *Id.* at 301, 160 N.E.2d at 374. The reasoning of the Court also indicates that "against the peace and dignity of the state of Ohio" is not a mere formalistic requirement since the words have content reaching beyond the language involved.

[223] That the Courts have the obligation to construe statutes in accordance with the presumed legislative intention that the statute be constitutional was supported by State v. Nieto, 101 Ohio St. 409, 423, 130 N.E. 663, 667 (1920) (dissenting opinion). Ohio courts have been required in the past to develop their own construction of a statute in order to bring it into conformity with constitutional requirements. *See, e.g.*, State v. Jacobellis, 173 Ohio St. 22, 179 N.E.2d 777 (1962), *rev'd*, 378 U.S. 184 (1963).

[224] OHIO CONST., art. I, § 1.

reading of article I, section 4, supports the same conclusion, since it guarantees the people "the right to bear arms for their defense and security . . . ," although the question remains whether the framers intended to protect the bearing of arms only for the common defense or whether they intended the protection to extend to the individual's self protection.[225] It might even be argued that the right to defend one's self is supported by article 1, section 20, of the Ohio Constitution, that "this enumeration of rights shall not be construed to impair or deny others retained by the people,"[226] since the Ohio Supreme Court has recognized the right of self-defense even without reference to a specific provision of the Ohio constitution.[227]

The federal Constitution also precludes criminalizing and punishing an act done in self-defense and, thus, requires "unlawfulness" to be read into the Ohio murder statute as an element of the crime. The *Mullaney* majority recognized that since the sixteenth century, a homicide resulting from an act done in self-defense was justifiable and not unlawful.[228] This fact indicates that the right of self-defense should be classified as a right "so rooted in the tradition and conscience of our people as to be ranked as fundamental" and given the protection of the Due Process Clause of the fourteenth amendment.[229] The right has been recognized by earlier federal case law, lending support to this proposition. In *Beard v. United States*,[230] where the Supreme Court held that a defendant who had been confronted on his property by a threatening, armed assailant was under no duty to flee the danger, the Court went through a lengthy analysis of the common law and American authorities stating that self-defense was a justification for an otherwise unlawful act.[231] It can be argued that if a state were not precluded by the fourteenth amendment from deeming an act done in self-

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225 OHIO CONST., art. I, § 4. *See* State v. Hogan, 63 Ohio St. 202, 218, 58 N.E. 572, 575 (1900), in which the court stated that the constitutional right is for the "defense of self and property . . . [which] secures to him a right of which he cannot be deprived," indicating that this is an individual right, and not a right existing only when the general citizenry is in danger.

226 OHIO CONST., art. I § 20.

227 *See* State v. Nieto, 101 Ohio St. 409, 415, 130 N.E. 663, 664 (1920), in which the court recognized the "rights of an individual to defend his person against death or great bodily harm within his house." *See also* text accompanying notes 200-202 *supra*.

228 421 U.S. at 692.

229 *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) in which Justice Goldberg, concurring, argued that *Snyder* supported the proposition advanced in the ninth amendment, that fundamental rights could not be limited to those rights listed in the first eight amendments to the Constitution. *Id.* at 493.

230 158 U.S. 550 (1895).

231 *Id.* at 562-63. *See also* United States v. Rhodes, 27 F. Cas. 785, 787 (Cir. Ct. Ky. 1866) (No. 16, 151) where it was stated: "Where crime is committed with impunity . . . those unprotected by other sanctions . . . [are required] . . . to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security."

defense a crime, the state could require an innocent person seeking to obey the law to submit to death or serious harm rather than injure the assailant by acting in self-defense.[232] While the logic of this argument is forceful, however, until this time the Supreme Court has never had the occasion to decide whether the right of self-defense is a fundamental right.

While there are many practical and constitutional arguments for reading "unlawfulness" into the murder statute, it is important to note that the first time the Ohio Supreme Court considered the question of burden allocation when self-defense was in issue, it created a judicial presumption of unlawfulness in the statute. In *Silvus v. State,*[233] counsel for the defendant had argued that the state must prove the killing to be unlawful and that if it was done in self-defense, it was not unlawful.[234] The court found that the burden of showing unlawfulness could not be placed on the prosecution because this placement of the burden would "destroy the presumptions arising from the homicide."[235] The court, in determining that a presumption of unlawfulness arose once the killing by the defendant was established, would have brought the case squarely within the reins of *Leary v. United States*[236] if the presumption were relied upon today.

The United States Supreme Court, in *Leary,* had noted that a statutory presumption would be struck down "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[237] *Mullaney* indicated that the standard may be much greater in the circumstance where presuming the existence of a fact shifts the burden of persuasion on that fact to the defendant since "the Due Process Clause demands more exacting standards before the State may require a defendant to bear this ultimate burden of persuasion."[238] The test of whether the presumed fact follows

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[232] *See* OHIO REV. CODE ANN. § 1.47 (Page 1975), which states: "In enacting a statute, it is presumed that . . . (C) A just and reasonable result is intended." A statute stating that an innocent person could not use self-defense in his protection would be irreconcilable with the just and reasonable intentions of the legislature since the legislature would require the person to submit voluntarily to death though able to protect himself.

[233] 22 Ohio St. 90 (1871).

[234] *Id.* at 92.

[235] *Id.* at 99. The presumption of unlawfulness was discussed from the standpoint of a presumption of malice, indicating that the court found malice and unlawfulness interchangeable concepts. This is consistent with other Ohio cases which have considered the two terms. *See* note 207 and accompanying text *supra.*

[236] 395 U.S. 6 (1969).

[237] *Id.* at 36. *See* Barnes v. United States, 412 U.S. 837, 843, 846 (1973) in which it is suggested that the proven fact may need to eliminate any reasonable doubt that the presumed fact exists.

[238] 421 U.S. 703 n.31.

from the evidence, according to *Barnes v. United States,*[239] is whether the presumption meets with "common sense and experience." In light of the Model Penal Code's assertion that given the fact of an intentional homicide, "no one can estimate the probability it was or was not committed in self-defense," it may be constitutionally impermissible for the courts to presume that the element of unlawfulness exists in the Ohio murder statute if the effect is to shift the burden of persuasion to the defendant.[240]

Whether an Ohio court could rely upon *Silvus* for the proposition that it is possible to read an element of unlawfulness into the murder statute then becomes a question of whether the Ohio Supreme Court would have adopted such a posture if it could not have shifted the burden of persuasion as to self-defense to the defendant under *Leary* or *Mullaney*. If the court would have implied the element of unlawfulness without respect to the eventual burden allocation, *Silvus* supports the proposition that the element should be read into the present statute to rest the burden of persuasion on the prosecution to prove that the killing occurred unlawfully.

Even if the element of unlawfulness is not read into the Ohio murder statute, another plausible argument exists for resting the burden of persuasion on the prosecution to show lack of self-defense. In the General Provisions of the Ohio Criminal Code, the Ohio Legislature has provided that: "a person is not guilty of an offense unless . . . [h]is liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing . . . ."[241] Because the legislature has indicated that the General Provisions chapter is to apply to the criminal law in general,[242] the prosecution is required to prove that, in addition to the elements of any crime specifically set forth the criminal act in question was done voluntarily. If such voluntariness would preclude imposition of liability for an act done in self-defense, *i.e.,* if self-defense makes an act *involuntary* under the code, then the burden of persuasion cannot be shifted to the defendant. The legislature defines "involuntary acts" by presenting examples, among which are "[r]eflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition . . . ."[243]

Although one can argue that self-defense is not used willingly by the actor who utilizes it to protect himself, it is difficult to classify self-defense as the type of "reflexive" action which the legislature intended to exclude

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[239] 412 U.S. at 845.

[240] MODEL PENAL CODE § 1.13 Comment (Tent. Draft No. 4, 1955).

[241] OHIO REV. CODE ANN. § 2901.21(A) (1) (Page 1975).

[242] OHIO REV. CODE ANN. § 2901.01-2901.45, Committee Comment (Page 1975).

[243] OHIO REV. CODE ANN. § 2901.21(C) (2) (Page 1975).

from liability.[244] A second problem is that if self-defense is recognized as an involuntary act within the meaning of the code, then the analysis of burden-shifting applicable to that defense may also be applicable to other defenses for which the actor does not have "the ability to refrain from doing that act," such as insanity.[245] This would mean that the state would face the problem of proving that a defendant is sane in opposition to an overwhelming judicial reluctance to do so.[246] The second problem can be diminished by dividing cases of involuntariness into two separate categories: those where one is unable to understand the nature of his act or conform to lawful conduct, as in insanity, and those where although one is able to understand his act, he must attempt to conform his act to law in the face of external pressure, *i.e.*, where one is moved by duress or necessity, or acts in self-defense. However, the first problem, that of classifying self-defense as an involuntary act, still constitutes the most formidable barrier to placing the burden of persuasion on the prosecution under the theory that the element of "voluntariness" can be read into the murder statute.

IV. CONCLUSION

The propriety of reading the element of unlawfulness into the Ohio murder statute is founded on an analysis of *Mullaney* and *Patterson* which indicates that burden allocation relies upon a test much wider in scope than the narrow "elements" approach suggested by *Winship*. Had the *Mullaney* Court been concerned only with forcing the defendant to bear the burden of persuasion on those facts of the crime which were statutorily defined as elements of the crime, then the *Mullaney* Court could have concluded that the defendant must show by a preponderance of the evidence that he acted in the heat of passion. The Court, however, went beyond form to reach the substance of the crime involved. It found that the burden was improperly placed on the defendant after a review of objective history and the subjective interests of the defendant and the state.

Mullaney, on its face did not conclude that the culpability factor involved in that case was an element of the crime, although the Supreme Court in *Patterson* determined that *Mullaney* stood for that conclusion. When

[244] *See* W. LAFAVE & A. SCOTT, *supra* note 9, § 25, at 179 n.22, where the authors speak of a voluntary act as one that "must be willed." This adds no clarification to the problem, however, since "will" can be used in the narrow sense to mean non-reflexive action, as well as in the broader sense to mean "desired" action. The act of self-defense seems similar to LaFave and Scott's example of a person who finds himself falling and reaches out to grab an object to prevent the fall. The act is viewed as voluntary, according to the authors, since the person's "mind has quickly grasped the situation and dictated some action." *Id.* at 181.

[245] *See* State v. Jackson, 32 Ohio St. 2d 203, 291 N.E.2d 432 (1972), *cert. denied*, 411 U.S. 909 (1973).

[246] State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (Celebrezze, J., concurring). *See also* notes 99-120 and accompanying text *supra*.

the Supreme Court differentiated the New York mitigation factor from the heat of passion defense in *Mullaney*, it did so by concluding that *Mullaney* had been decided on the basis of a *wide* elements approach. *Patterson*, thus, supports the view that the balancing approach used in *Mullaney* should be applied when determining whether a fact of the crime should also be an *element* of that crime.

In view of these cases, statutorily defined elements play a subordinate role to the real interests at stake. Even if the legislature determines the elements of the offense with which an individual will be charged in the complaint, as it would under Senate Bill Number 42, the judiciary possesses the power to recognize other elements of the offense which the legislature had not specifically defined. If an affirmative defense relates to one of these statutorily undefined elements, then the prosecution must also bear the burden of proving those elements and negating the facts constituting the defense. This places the practical burden on the legislature prior to the enactment of a criminal statute, to consider every fact for which the burden of persuasion may possibly rest on the defendant and to make an independent determination of the relative interests involved, state and individual. It must weigh each and conclude in light of these interests on whom the burden of persuasion can be placed without violating the Due Process Clause. The opportunity for error is great because the test is necessarily one of inexactitude.

While a number of arguments are available to support the proposition that unlawfulness should be read into the Ohio murder statute because of the interests involved, no argument is free from question by those claiming that the state's interest in having the defendant bear the burden of proof on the issue of self-defense (as well as on the issues involved in other affirmative defenses) is paramount. Just as the *Patterson* Court found that the state's interest in placing the burden of persuasion on the defendant to show severe emotional distress was too great to leave on the state, so, too, may the courts in Ohio find that such a compelling interest requires the defendant to bear the burden of persuasion on a number of issues in this state. It is submitted here only that, with respect to self-defense, the interests seem to weigh heavily in favor of placing the burden of persuasion on the state to prove that the defendant did not act in protection of his life.

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* The author wishes to thank Margery Koosed and Richard Aynes for their assistance in providing resource materials for the content of this comment.